Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

PROFESSOR JOHN C. BONNELL and
NANCY BONNELL,
Petitioners,

v.

ALBERT LORENZO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES C. HOWARTH
Counsel of Record
JUAN A. MATEO
ATTORNEYS AT LAW
2000 PENOBSCOT BUILDING
DETROIT, MI 48226
(313) 962-3500

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

141PP

QUESTIONS PRESENTED

I. CAN COMMUNITY COLLEGE ADMINISTRATORS SUSPEND A PROFESSOR OF ENGLISH LITERATURE AND COMPOSITION FOR SPEAKING OUT ON A MATTER OF PUBLIC CONCERN ON THE MERE SPECULATION OF SOME SUPPOSED FUTURE HARM?

II. IS THERE A SPLIT AMONG THE CIRCUITS ON THE SUBJECTS OF ACADEMIC FREEDOM, FREE SPEECH IN EDUCATIONAL INSTITUTIONS AND THE RIGHTS OF TEACHERS BALANCED AGAINST SCHOOL ADMINISTRATORS?

III. WAS THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS CLEARLY ERRONEOUS?

LIST OF PARTIES

Petitioners

Professor John C. Bonnell and Nancy Bonnell have no corporate affiliations

Respondents

Albert Lorenzo, Individually and in his Representative Capacity as President of Macomb Community College; William MacQueen, Individually and in his Representative Capacity as Vice President for Human Resources of Macomb Community College; Gus J. Demas, Individually and in his Representative Capacity as Dean of Arts and Sciences for Macomb Community College; and Mark Cousens, Individually and in his Representative Capacity as the Attorney for the Macomb Community College Faculty Organization

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The order of the United States Court of Appeals for the Sixth Circuit denying rehearing en banc (6th Cir. 5/2/01) is set forth in the Appendix hereto (App. C at 120a).

The opinion of the United States Court of Appeals reversing the decision of the District Court for the Eastern District of Michigan is set forth in the Appendix hereto (App. A at 1a).

The Memorandum of Decision of the District Court for the Eastern District of Michigan in *Bonnell v Lorenzo* is unreported and set forth in the Appendix hereto (App. B at 61a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Sixth Circuit denying rehearing en banc of that court's reversal of the district court's granting of injunctive relief to petitioner was entered on May 2, 2001. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. §2101(c).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law ... abridging the freedom of speech ...

United States Constitution, Amendment XIV, Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or The District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ....

STATEMENT OF THE CASE

Petitioner Professor John Bonnell ("Bonnell") has been an instructor of English language and literature at Macomb Community College ("the College") for 33 years.[1] Bonnell achieved a certain notoriety at the College for his use of the full spectrum of the English language in teaching his classes. Whereas Bonnell employed words such as "shit," "damn," "fuck," "blow job," among others, the words were never gratuitous, were always germane to course content and were never directed at a student or group of students. Bonnell used these words and phrases as a means of instructing his students as to how authors from Chaucer to James Joyce to Tim O'Brien chose language or were forbidden from using it.

Although Bonnell's teaching methods were overwhelmingly popular and appreciated by his students, in 1998 the parent of one student complained to the College about Bonnell's vocabulary. The complaint resulted in a reprimand by respondent William MacQueen, the College's Vice President for Human Resources.

In November, 1998, a part-time student, enrolled in an unrelated college, became the first student to publicly complain about Bonnell's classroom language. Her written complaint stated, in part, that "Mr. Bonnell began using lude (sic) and obscene comments. These comments stemmed from

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[1] Macomb Community College is a two year institution of higher learning, located principally in Warren, Michigan. The College is not a party to this cause. The respondents involved in this writ are Albert Lorenzo, President of the College, William MacQueen, the College Vice President for Human Resources, and Gus J. Demas, Dean of Arts and Sciences.

English stories we were reading in class ..." The complaint was couched in terms of sexual harassment, but the College has always admitted that that charge was unfounded. Nevertheless, after certain investigations Bonnell was suspended from teaching for three days in February, 1999, for his classroom language.

During the course of the disciplinary process, Bonnell distributed copies of the complaint to all of his students, after carefully redacting the student's name and identifying information, so that the matter could be discussed in class and any student with similar views could inform the professor, the class or the College.

Later Bonnell distributed copies of the redacted complaint to the entire faculty, accompanied by an acerbic, satirical, eight-page essay, entitled *"An Apology: Yes, Virginia, There is a Sanity Clause." ("Yes, Virginia").*[2] MacQueen then, by written memorandum, directed Bonnell "not to post, distribute or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment or your use of obscene or vulgar language ..." Bonnell then provided the redacted complaint and *"Yes Virginia"* to a local newspaper and two television stations.

During Bonnell's suspension his students boycotted his classes, while signing attendance sheets indicating they supported Bonnell and protested his suspension. MacQueen, on February 2, 1999, suspended Bonnell indefinitely, pending

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[2] "Apology" referred to the Greek term for defense, "apologia." "Yes, Virginia" referred to the Christmas letter, published in the New York Sun. The "Sanity Clause" referred to the First Amendment free speech clause.

investigation by the College into Bonnell's dissemination of the documents to the media and the *sua sponte* decision of the students to demonstrate and not attend class.

Bonnell, on March 10, 1999, filed a six count complaint against respondents in the Federal Court for the Eastern District of Michigan, alleging, *inter alia,* a violation of his civil rights pursuant to 42 U.S.C. §1983 and §1985, violation of his First Amendment rights to free speech and association and his Fourteenth Amendment rights to due process and equal protection. That suit also asked for a temporary restraining order to enjoin respondents from enforcing the disciplinary suspension.

The district court initially denied the preliminary injunction and remanded the matter to the College for an administrative hearing. The hearing was held on May 25, 1999, and Bonnell denied any wrongdoing. The College presented no evidence.

After a finding of "probable cause" by MacQueen on June 7, 1999, Rose Bellanca, the College Provost, issued a memorandum on July 9, 1999, (written by MacQueen) finding Bonnell guilty of disruption of the educational process, insubordination, breach of confidentiality and retaliation for a complaint of sex harassment. The punishment was a four month suspension from teaching, without pay, for the Fall, 1999 semester.

Bonnell then filed a renewed motion for a preliminary injunction in the district court. The Honorable Paul D. Borman heard testimony and oral argument in July and August, 1999. On August 27, 1999, the district court issued a memorandum opinion, granting a preliminary injunction and

Bonnell returned to his teaching position on August 30, 1999, where he now remains until August 15, 2001.

The district court ruled that Bonnell had a First Amendment right, as an employee of a state college and a private citizen, to speak out on a matter of public concern: the College's restrictions on free speech, academic freedom and the First Amendment itself. The court labeled the "gag order" imposed by the College an unconstitutional prior restraint. The district court then carefully balanced the right of an employee/citizen to speak on a matter of public concern against the interest of the College to promote the efficiency of the services it performs. The court found this balance to favor petitioner Bonnell.

Respondents then appealed to the United States Court of Appeals for the Sixth Circuit. On March 1, 2001, the Sixth Circuit reversed the district court and remanded for further proceedings. The circuit court agreed with the district court that Bonnell was, indeed, speaking out on a matter of public concern. However, the Sixth Circuit ruled that the district court did not properly balance the respective interests according to the dictate of *Pickering v Bd. Of Educ.*, 391 U.S. 563, 568 (1968). The Sixth Circuit accepted totally unproven concerns of sex harassment, retaliation and campus disruption to overcome, in the balance, the First Amendment free speech right of Professor Bonnell.

On May 2, 2001, the circuit court denied petitioner's request for rehearing or rehearing *en banc*. Bonnell has duly filed his petition for writ of certiorari within ninety days of the entry of that ruling. 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

PROPOSED QUESTION

I. CAN COMMUNITY COLLEGE ADMINISTRATORS SUSPEND A PROFESSOR OF ENGLISH LITERATURE AND COMPOSITION FOR SPEAKING OUT ON A MATTER OF PUBLIC CONCERN ON THE MERE SPECULATION OF SOME SUPPOSED FUTURE HARM?

THE QUESTION IS IMPORTANT

This case is of utmost importance because the decision of the Sixth Circuit contradicts the maxim of the Supreme Court that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v DesMoines Independent Community School District*, 393 U.S. 503, 506 (1969). The Sixth Circuit has determined that rightful protest of unconstitutional charges and disabling gag orders can be punished under the rubric of "insubordination" and "retaliation." The panel, like the College administrators, has dangerously decided that there is no distinction between speech or expression and conduct.

The chilling effect that comes with the revocation of academic freedom can already be witnessed on college campuses. Administrators trained in law issue gag orders to professors and insist they stop discussions of sensitive but legitimate topics. In the instant case, the in-class topics include human sexuality, the nature of language - including so called "forbidden" words, love and relationships, and death

.... All recurring subjects explored in essays and literature. See, *Roth v United States,* 354 U.S. 476 (1957).

Sexual harassment definitions are continually expanding and, with this decision in the Sixth Circuit, now include scholarly opinions and attitudes expressed in the classroom. If allowed to stand, this decision empowers a single student, complaining of discomfort arising from discussions that "stemmed from English stories we were reading in class," to dictate course content and professorial methodology.

If the professor then dares to speak out to his colleagues, students, or the media about the chilling effect of such action on academic freedom - clearly a matter of public concern - this decision allows those lawyer/administrators to immediately remove the professor from his classroom thereby depriving him of his livelihood, his future security/retirement benefits, and his profession that has spanned more than 33 years.

At the present time, the existence of academic freedom for professors at colleges and universities is determined by the Circuit in which the institution resides. In the Sixth Circuit, this decision allows College administrators to strip all in-class free speech rights by labeling it "harassment" where clearly it does not apply. It then gives those same administrators the right to use Orwellian tactics to stop any expression outside of the classroom that is attempted to bring this important matter of public concern to light.

II. THERE IS A SPLIT AMONG THE CIRCUITS ON THE SUBJECTS OF ACADEMIC FREEDOM, FREE SPEECH IN EDUCATIONAL INSTITUTIONS AND THE RIGHTS OF TEACHERS BALANCED AGAINST SCHOOL ADMINISTRATORS.

A professor, student or college dean who might today peruse the panoply of federal appellate decisions regarding the free speech rights of students or teachers balanced against the regulations imposed by administrators or the states, could only conclude that First Amendment rights are not uniformly interpreted or enforced in this country on campuses of higher learning or in appellate courts.

The Fourth, Fifth and Tenth Circuits, now possibly joined by the Sixth in light of this case, have taken a restrictive view of classroom free speech. In *Martin v Parrish,* 805 F. 2d 583 (5th Cir. 1986) the court allowed discipline of a professor who used profanity in his classroom to motivate students. Likewise, in *Urofsky v Gilmore,* 216 F. 3d 401 (4th Cir. 2000) the court upheld a state law prohibiting a professor's access to college owned computers for clinical research on pornography. The *Urofsky* court even suggested that academic freedom is a principle that does not empower professors but only the teaching institution. *Id.* at 415. The Sixth Circuit in *Dambrot v Central Michigan University,* 55 F. 3d 1177 (6th Cir. 1995), had restricted a college employee from using the word "nigger" to students, but that employee was a basketball coach and not a professor. The Tenth Circuit has ruled that a student can be disciplined for drawing a Confederate flag in math class because the flag could cause disruption and racial tension. *West v Derby Unified School District No. 260,* 206 F. 3d 1358 (10th Cir. 2000).

On the other hand, most circuits recognize that the First Amendment transcends college administrators' mere speculation of some supposed future harm.

Cohen v San Bernardino Valley College, 92 F. 3d 968 (9th Cir. 1996), overruled discipline of a college professor who used obscenity in class, discussed cannibalism, and advocated consensual sex with children. *Burnham v Ianni,* 119 F. 3d 668 (8th Cir. *en banc* 1997) held that a professor's speech on a matter of public concern trumped the college's bald assertion of campus disruption. *Id.* at 679-680. *Saxe v State College Area School District,* 240 F. 3d 200 (3rd Cir. 2001) ruled that a high school speech code violated the First Amendment even though it banned speech "that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs." *Id.* at 206. *Saxe, supra,* specifically rejected an undifferentiated fear or apprehension of school disturbance as an excuse to prohibit free classroom speech. *Id.* at 211. The Seventh Circuit has held that "speech by public employees spoken pursuant to their employment duties [constitutes] speech on a public concern." *Bonds v Milwaukee County,* 207 F. 3d 969, 980 (7th Cir. 2000). In *Blum v Schegel,* 18 F. 3d 1005 (2nd Cir. 1994) the Second Circuit held as a protected matter of public concern a law professor's discussion of the legalization of marijuana and criticism of national drug control policy in his classroom and writings. See also, *Nunez v Davis,* 169 F. 3d 1222 (9th Cir. 1999) *cert. denied,* 120 S. Ct. 932 (2000).

The current state of the law on academic freedom in the circuit courts is confusing, contradictory and impossible to accurately predict. This Court has not squarely visited the question since its seminal decision in *Tinker v Des Moines Indep. Community Sch. Dist.,* 393 U.S. 503 (1969).

Petitioner suggests that the instant case should be the forum for establishing a viable precedent to unify federal law in this important area.

III. THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS IS CLEARLY ERRONEOUS.

The Sixth Circuit found the district court's view of the evidence clearly erroneous, as is required for reversal according to *United States v United States Gypsum Co.*, 333 U.S. 364, 395 (1948). The district court's findings were never shown to be even minimally erroneous. This Court has clearly ruled that "[w]here there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous." *Anderson v City of Bessemer City, North Carolina,* 470 U.S. 564, 574 (1984).

The panel below correctly found that petitioner, in protesting the discipline against him for classroom speech, was constitutionally protected because he was speaking out on a matter of public concern, the First Amendment. That being so "the government bears the burden of justifying an adverse employment action." *United States v National Treasury Employees Union,* 513 U.S. 454, 466 (1995), citing *Rankin v McPherson,* 483 U.S. 378, 388 (1987). However, the panel, in employing the *Pickering, supra,* balancing test ignored petitioner's injury while exaggerating respondents' non-existent damages.

This Court has squarely held that "[t]he loss of First Amendment freedom, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v Burns,* 427 U.S. 347, 373 (1976). This Court has equally squarely held that "[i]n our system undifferentiated fear or

apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker, supra,* at 508. Professor Bonnell has been substantially harmed, while the College is unscathed. No Title IX[3] complaint was filed, no claim was made of actual disruption, loss of revenue or enrollment and no retaliation issue under F.E.R.P.A.[4] has been raised. As Justice Brandeis wrote: "Fear of serious injury cannot alone justify suppression of free speech and assembly." *Whitney v California,* 274 U.S. 357, 376 (1927). The College argued, and the panel erroneously agreed, that Bonnell's classroom use of the vernacular, whether or not germane to course content, could be deemed sex harassment and creation of a hostile work place environment. That conclusion ignores this Court's holding to the contrary in *Gerber v Lago Vista Independent School District,* 524 U.S. 274 (1998); *Oncale v Sundowner Offshore Services, Inc.,* 523 U.S. 75 (1997); and *Harris v Forklift Systems, Inc.,* 510 U.S. 17 (1993). Pure speech, without improper physical action, is clearly protected by the First Amendment. *Cohen v California,* 403 U.S. 15, 24 (1971).

This Court has held that "sex and obscenity are not synonymous .... The portrayal of sex, e.g., in art, literature and scientific works is not itself sufficient reason to deny the material the constitutional protection of freedom of speech and press." *Roth v United States,* 354 U.S. 476, 487 (1957). See also, *Reno v ACLU,* 521 U.S. 844, 877 (1997). The decision of the Sixth Circuit clearly erodes the principles of free speech this Court has long established.

The professors' calling is to contribute to the robust exchange in the marketplace of ideas, which is part of "a

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[3] Education Amendments of 1972, 20 U.S.C. §§1681-1688 (1997).

[4] Federal Family Educational Privacy Act

tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 835 (1995). If a college professor reasonably relies on the often announced protection of free speech in the academic community by this Court, and in that reliance speaks out to protest a blatant infringement of that freedom, how can it be that a college can punish him based on no more than conjecture, speculation and undifferentiated fear? If this Court allows the decision below to stand, that frightening proposition will be the law in the Sixth Circuit.

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Sixth Circuit reversing the district court's granting of injunctive relief to petitioner.

Respectfully submitted,

JAMES C. HOWARTH (P15179)
JUAN A. MATEO (P33156)
2000 Penobscot Building
Detroit, MI 48226
(313) 962-3500

Dated: July 26, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-2047

[February 4, 2000, Argued]
[March 1, 2001, Decided]
[March 1, 2001, Filed]

JOHN C. BONNELL and NANCY L. BONNELL, Plaintiffs-Appellees,

v.

ALBERT LORENZO, WILLIAM MACQUEEN, and GUS J. DEMAS, Defendants-Appellants,

MARK COUSENS, Defendant.

JUDGES:

Before: NELSON, COLE, and CLAY, Circuit Judges. CLAY, J., delivered the opinion of the court, in which COLE, J., joined. NELSON, J., delivered a separate concurring opinion.

OPINION

CLAY, Circuit Judge. Defendants, Albert Lorenzo, William MacQueen, and Gus J. Demas, appeal from the order granting Plaintiffs, John C. Bonnell and his wife Nancy L. Bonnell, injunctive relief as to Defendants' disciplinary suspension of John Bonnell from his teaching position at Macomb Community College ("the College"), in this case brought by Plaintiffs for, among other things, violation of John Bonnell's civil rights under 42 U.S.C. § 1983 and § 1985. This case presents us with the difficult task of balancing the precious First Amendment rights of a professor in the academic setting, against the legal obligation of a college to guarantee the rights of students to learn in an environment free of sexual harassment and hostility. Mindful of the significant import of the respective interests involved, we conclude that the balance tips in favor of the College such that the district court erred in granting the extraordinary relief of a preliminary injunction under the specific facts of this case.

We therefore **REVERSE** the district court's order.

BACKGROUND

Plaintiff has taught English Language and Literature at the College since the Fall of 1967. Plaintiff is a member of the Macomb Community College Faculty Organization ("MCCFO") and is employed pursuant to a Collective Bargaining Agreement ("CBA").[1]

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[1] We shall make reference to "Plaintiff" in the singular throughout this opinion, inasmuch as John Bonnell is the Plaintiff against whom disciplinary action was taken, while Plaintiff Nancy Bonnell's claims are all derivative of John Bonnell's claims.

In a memorandum dated February 19, 1998, entitled "Obscene and vulgar language in classroom," MacQueen informed Plaintiff that the parent of one of Plaintiff's students (not the complainant in the instant case) had filed a letter of complaint against him based upon a handout that Plaintiff had circulated to the members of his class. The handout, entitled "My Semester Overview," is actually a review of Plaintiff's class prepared by one of Plaintiff's former students in 1991. The handout, as quoted in the memorandum, states as follows:

> "Next, the language that was used during the first four weeks or so of class, in my opinion, was very inappropriate and distasteful. Never before have I encountered an English teacher who used the word "fuck" so openly and so frequently in a classroom discussion. In addition, the use of words such as "pussy" and "cunt" are simply uncalled for and very offensive to many, including me. I really feel that language such as this is very degrading to women."

(J.A. at 101.) MacQueen went on to inform Plaintiff that "although I do not know the context in which these words are used, I am concerned that your use of such language in the classroom will give rise to a claim of sexual harassment on

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Defendant Albert Lorenzo is being sued individually and as President of the College; Defendant William MacQueen is being sued individually and as Vice President for Human Resources at the College; Defendant Gus J. Demas is being sued individually and as Dean of Arts and Science at the College; Defendant Mark Cousens is an attorney for the College's union, Macomb Community College Faculty Organization, and is not a party to this appeal.

the theory that this language creates a hostile learning environment for women. Simple knowledge of your past use of this language places the College under a legal duty to investigate whether you are creating a hostile learning environment." (J.A. at 101.) Accordingly, a meeting was scheduled with Plaintiff, his MCCFO representative, and MacQueen, Dr. Ruth Reed, James Van Eman (the College's General Counsel), and Margaret MacTavish (the College's Affirmative Action Officer), for February 26, 1998 to investigate the matter.

Plaintiff agreed to the meeting and defended his use of such language. Plaintiff maintained that none of the terms at issue were directed to a particular student and were only used for demonstrating an academic point. Plaintiff claimed that he used the terms to "point out the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade." (J.A. at 30.)

The February 26, 1998, investigation concluded with MacQueen issuing a warning to Plaintiff via a memorandum dated March 4, 1998, entitled "Obscene and vulgar speech," which states in relevant part:

> This memorandum will confirm my verbal warning to you concerning your use of obscene and vulgar language in the classroom.
>
> . . .

Unless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as 'fuck,' 'cunt,' and 'pussy' may serve as a reasonable basis for

concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment. Federal and state law imposes a duty on the College to prevent the sexual harassment of its students and therefore requires that the College discipline you if it finds that you have created a hostile environment.

The principle of academic freedom under the 1st Amendment serves to protect the utterances in question only if they are germane to course content as measured by professional teaching standards. Since the precise frontier between academic freedom and sexual harassment remains to be defined by the courts case by case, a teacher of English literature or composition courses may be able to find safety and comfort under the 1st Amendment only if the words uttered are found in appropriate textual materials and the utterances are pertinent to discussion of those materials. Beyond this point, the teacher enters uncharted territory and proceeds at his or her own risk of being found guilty of sexual harassment. Consequently, you are warned that a general use in the classroom of words like 'fuck,' 'cunt,' and 'pussy' outside a professional exegesis may compel the conclusion that you are creating a hostile learning environment requiring disciplinary action.

(J.A. at 102.)

About eight months later, in November of 1998, a female student enrolled in Plaintiff's English 122 class, and filed a written "sexual harassment" complaint with the College ("the Complaint"), claiming that Plaintiff's classroom language constituted sexual harassment. (J.A. at 230.) The Complaint states in relevant part:

This is a letter of formal complaint against

> Professor John Bonnell. I am currently a student in Mr. Bonnell's class, English 122 from 8-9:30 PM on Mondays and Wednesdays. My complaint against Mr. Bonnell is sexual harassment. . . .

Beginning in middle to late September the atmosphere of the class started to change from comfortable to extremely offensive. Mr. Bonnell began using lude [sic] and obscene comments. These comments stemmed from English stories that we were reading in class, and he decided to add his own personal comments. These comments were dehumanizing, degrading, and sexually explicit. Some of the stories that were required reading revealed sexual innuendoes and implications. This should have been dealt with in a professional and appropriate manner, yet Mr. Bonnell displayed a lack of maturity, sensitivity, and responsibility, by taking advantage of the conversations to express his own previous sexual experiences. If this class had been a psychology or human sexuality class, I might have understood more of why sex was the major content of our class. This was supposed to be an English class and I feel cheated out of my money because I paid tuition to learn English. I did not pay to hear about Mr. Bonnell's sexual escapades. I feel that he also used his teacher position as a platform for authority to intimidate his students not to complain about him. Mr. Bonnell repeatedly made fun of students who had expressed offense or disgust and [**8] he also laughed at them. This is one of the reasons why I did not come forward sooner. I feel compelled to speak up now so as to save further embarrassment to Macomb Community College. I, as a student, and as a wife have been strongly affected mentally and emotionally due to the sexual harassment from Mr. Bonnell. My husband and I are fully prepared to take this sexual harassment complaint to the highest level of authority it can go.

My goals of filing this complaint is [sic] to, at the very least, receive credit for English 122, and a written apology from Mr. Bonnell. I also would like Mr. Bonnell to be dismissed from the college immediately. Mr. Bonnell also needs to go to a counselor to discuss his sexual problems. I would also like Mr. Bonnell to be denied all access to my and my husbands [sic] social security numbers, student accounts, address, and telephone numbers. I expect and demand that this sexual harassment be taken seriously and given top priority. Thank you for acting immediately and swiftly in this matter.

J.A. at 230.)

As a result, Gus J. Demas, Dean of Arts and Science at the College, scheduled a meeting with Plaintiff to further investigate the matter, and also provided Plaintiff with a copy of the Complaint. Plaintiff made copies of the Complaint and passed them out to the students in all six of his classes after redacting the complaining student's name, and also posted a copy of the Complaint on the bulletin board outside of his classroom. At a December 3, 1998, investigatory meeting, MacQueen warned Plaintiff about disseminating the Complaint inasmuch as it is the College's policy that all student complaints be kept confidential. However, Plaintiff did not heed MacQueen's warning and instead distributed copies of the Complaint to the more than two hundred College faculty members; attached to each copy of the Complaint was an eight-page satirical essay entitled "**An Apology: Yes, Virginia, There is a Sanity Clause**" ("the **Apology**") written by Plaintiff in response to the complaining student's sexual harassment Complaint. (J.A. at 232.)

Another meeting was held on December 18, 1998, which led to Demas issuing a memorandum to Plaintiff on

January 5, 1999, entitled "Disciplinary suspension," which informed Plaintiff that he was suspended for three days, commencing February 1, 1999 and ending February 3, 1999. (J.A. at 108.) The memorandum provides as follows:

> This memorandum is submitted as a statement of my finding that you used vulgar and obscene language without reference to assigned readings in your English 122 KR class during the fall 1998 term. Specifically, I find:
>
> 1. You made it a practice (as announced to the class at the start of the term) to swear in the classroom, using such words as 'shit,' 'damn,' 'fuck,' and 'ass.'
>
> 2. In relating a newspaper account of an act of necrophelia, you said that one doesn't expect to receive a serious 'butt-fucking' after being dead for two weeks.
>
> 3. In discussing President Clinton's relationship with Monica Lewinsky, you said that he received a 'blow job' from her. This term was used by you twice.
>
> 4. You remarked two or three times that "tits on a nun are as useful as balls on a priest."

In September, 1993 all faculty were informed that discipline will be imposed for the gratuitous and regular use of vulgar or obscene language in the classroom. In February, 1996 all faculty were informed that classroom speech is insulated from the College's sexual harassment policy only if it is germane

to course content as measured by professional standards. In July, 1997 all faculty were informed that the "regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline." In March, 1998, you alone were warned that "the principle of academic freedom under the First Amendment serves to protect the utterance [of words 'fuck,' 'cunt,' and 'pussy'] only if they are germane to course content as measured by professional standards and that "general use in the classroom of [these words] outside a professional exegesis may compel the conclusion that you are creating a hostile learning environment requiring disciplinary action." In view of these warnings and the defiance you have expressed in face of them, you are to be suspended from your teaching duties without pay for three days, commencing February 1, 1999 and ending February 3, 1999.

(J.A. at 231 (alterations in original).)[2]

On January 8, 1999, after becoming aware of Plaintiff's dissemination of the Complaint and other materials such as the **Apology**, MacQueen issued a memorandum to Plaintiff entitled, "Discussion of student complaints," which reads as follows:

> Please be advised that the administration is aware of the distribution to faculty of your paper titled "An Apology: Yes, Virginia, There is a Sanity Clause" and intends to determine the extent of and means used in the

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[2] The memorandum bears the erroneous date of January 5, 1998, instead of January 5, 1999.

distribution.

Because your posting, distribution and discussion of student complaints of sex harassment or your use of obscene or vulgar language conveys the message that complaining students may be expected to be ridiculed by you and ostracized by their classmates, and thus may be deterred from complaining, you are hereby directed not to post, distribute, or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment or your use of obscene or vulgar language, or such complaints against you generally, with any person enrolled in one or more of your classes unless written permission has been granted by Dr. Rose Bellanca upon application of your union or attorney. This prohibition extends to discussion of any disciplinary action which has or may be taken against you.

(J.A. at 240.)

In response to this directive, Plaintiff provided a copy of the redacted Complaint and the **Apology** to local television Channels 4 and 50, as well as to **The Macomb Daily** local newspaper,[3] and also informed the students in his class that he had been suspended for three days. On the days of Plaintiff's suspension, nearly every student in all five of his classes did not attend class despite the fact that a substitute teacher was there to take Plaintiff's place. However, the students pre-

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[3] The district court duly noted that Defendants eventually divulged the complaining student's identity, with her permission; but that occurred only after Plaintiff distributed the student's redacted Complaint without her permission in violation of the College's policies.

signed attendance sheets indicating that they supported Plaintiff and were protesting his suspension.

On February 2, 1999, MacQueen notified Plaintiff that he was suspended with pay and benefits pending an investigation into Plaintiff's actions such as disseminating the Complaint to the news media, because such actions "[are] or may be causally related to disruption of the educational process." (J.A. at 340.) Thereafter, Plaintiff filed the instant suit.

In response to the disciplinary action taken by Defendants, Plaintiff filed a six-count complaint against Defendants on March 10, 1999. Count I alleged that Defendants conspired to violate Plaintiff's civil rights in violation of 42 U.S.C. § 1985 and § 1983; Count II alleged that Defendants violated Plaintiff's First Amendment rights to free speech and association, Sixth Amendment right to counsel, and Fourteenth Amendment right to due process and equal protection of the law; Count III alleged that Defendants were grossly negligent in violating Plaintiff's civil rights; Count IV sought a temporary restraining order to enjoin Defendants from enforcing their disciplinary suspension of Plaintiff; Count V alleged negligence and breach of the duty of fair representation against Defendant Mark Cousens in failing to represent Plaintiff as legal counsel on behalf of the union; and Count VI alleged loss of consortium. Plaintiff later amended the complaint to add the pendent state law claim of breach of contract against the Board of Trustees of the Community College District of the County of Macomb. Plaintiff also filed a motion for a preliminary injunction requesting his immediate reinstatement to his teaching position at the College.

The district court initially denied the motion for a preliminary injunction and remanded the matter to the College for an administrative hearing. Defendant William MacQueen, Vice President for Human Resources, presided over the May 25, 1999, hearing and on June 7, 1999 issued a memorandum finding "reasonable cause to believe that [Plaintiff] . . . violated Federal and Michigan law, College policies and directives, and the collective bargaining agreement between MCCFO and the College. In addition, there is reasonable cause to believe that you contributed improperly to the disruption of the educational process in your classes." (J.A. at 314.) The memorandum, entitled "Notice of charges," went on to specifically charge Plaintiff with 1) insubordination; 2) breach of confidentiality; 3) retaliation; and 4) disruption of educational process. *Id.* The memorandum concluded by informing Plaintiff that he was entitled to a hearing:

> Since a finding that you committed any of the violations alleged above (including disruption of the educational process) may lead to the imposition of discipline, you are entitled to a hearing before Dr. Rose Bellanca[, Provost,] at which you, your attorneys, and/or MCCFO may present evidence or argument in opposition to a conclusion that you committed them or that disciplinary action should be taken. Please have your attorneys or MCCFO representative inform Thomas P. Brady by June 18, 1999 whether you wish a hearing. If a hearing is not requested, Dr. Bellanca will proceed to a determination of these charges.

(J.A. at 316.) Plaintiff declined the invitation for a further hearing.

Subsequently, on July 9, 1999, Dr. Bellanca issued a memorandum to Plaintiff, entitled "Disciplinary Suspension," wherein Dr. Bellanca rendered her findings regarding the charges brought against Plaintiff, and concluded that Plaintiff "breached confidentiality and retaliated against the complaining student." Dr. Bellanca went on to state that the College was imposing the following disciplinary action for Plaintiff's conduct:

> As a result of your **disruption of the educational process**, you are hereby reprimanded and warned that any future actions which contribute to the disruption of the educational process at the College will subject you to further discipline.
> * * *
>
> As a result, the College finds you were **insubordinate** under the January 8 directive, and in light of the previous three-day disciplinary suspension which was issued to you, you are hereby suspended from your duties without pay for a period of fourteen calender days, commencing August 18, 1999, and ending August 31, 1999. Your fringe benefits will remain in place during the period of this suspension.
> * * *
>
> The College, therefore, finds you **breached confidentiality and retaliated against the complaining student.** In determining the appropriate discipline to be imposed for these

offenses, the College has looked to the "Guidance" published by the Office of Civil Rights within the U.S. Department of Education and to case law. The OCR Guidance states that the school should tell the complainant that Title IX prohibits retaliation and that, if she or he is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation **and will take strong responsive actions if retaliation occurs.** The College tried to prevent further retaliation by its directive to you of January 8, 1999, which you ignored. The College now feels obliged to take strong responsive action. Case law supports actions as severe as termination as being appropriate for breach of confidentiality.

The College gave serious consideration to terminating your employment effective immediately. However, in deference to your length of service with the institution, and in the belief that rehabilitation is still possible, the College has decided upon a suspension instead. Therefore, you are hereby suspended from your duties without pay for the four months of the Fall 1999 semester, commencing August 18, 1999 and ending December 18, 1999. This suspension will run concurrent with the fourteen day suspension issued for insubordination. In anticipation of your return to work in the Spring semester, your fringe benefits will remain in effect during the period of this suspension.

(J.A. at 425 (emphasis added).)

In response, Plaintiff filed a renewed emergency motion for preliminary injunction, upon which the district court heard testimony and oral argument on July 15 and 30, and August 3 and 19, 1999. On August 27, 1999, the district court issued its memorandum opinion and order granting Plaintiff's renewed motion for preliminary injunction. Plaintiff returned to his teaching position at the College on August 30, 1999.

Shortly after Plaintiff's return to the College, another student filed a complaint regarding Plaintiff's alleged profanity and offensive language used in the first night of class; his alleged denigration of the Jewish faith; and his alleged denigration of women. The student was so offended by Plaintiff's conduct, she demanded a full refund of her tuition for the class. The student stated that the only reason that she stayed throughout the entire class the first night was because she "did not want to take the chance of being caught in the crossfire of someone's rage. A feeling of uneasy nervousness overcame me. I felt trapped in the room for fear of getting up and causing a scene where he might humiliate me all the more." (J.A. at 493-94.) The student opined that "if you continue to employ this perverted man, I suggest that you put warning labels on all of the classes that he will be teaching . . . which state '**extremely explicit language and sexual content**' on the course list each semester." *Id.*

Defendants now appeal from the district court's August 27, 1999, opinion and order granting Plaintiff's

motion for a preliminary injunction and reinstating Plaintiff to his teaching position at the College.[4]

DISCUSSION

A. Standard of Review - Preliminary Injunction

A preliminary injunction is an extraordinary measure that has been characterized as "one of the most drastic tools in the arsenal of judicial remedies." *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986); *see* also *Detroit Newspaper Publishers. Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) (emphasizing that a preliminary injunction is the strong arm of equity which should not be extended to cases which are doubtful or do not come within well-established principles of law). We review the district court's decision to grant a preliminary injunction for an abuse of discretion while giving great deference to the district court's determination; however, our deference to the district court is not absolute. *Mascio v. Pub. Employees Ret. Sys.*, 160 F.3d 310, 312-13 (6th Cir. 1998). Which is to say, the injunction will be disturbed if the

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[4] Plaintiff's period of suspension was over before this case was heard on appeal, despite the district court's issuance of the preliminary injunction; however, we find this matter justiciable in any event because the case involves an order "capable of repetition yet evading review." *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515, 55 L. Ed. 310, 31 S. Ct. 279 (1911); see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 377, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979) (finding that a matter is not moot when "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and there was a reasonable expectation that the same complaining party would be subjected to the same action again").

district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. See *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir. 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *See United States v. United States Gypsum, Co.,* 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948).

With our review standard and the gravity of the relief in mind, we now address the district court's order in the case at hand granting Plaintiff injunctive relief.

B. Analysis - Whether the District Court Properly Granted a Preliminary Injunction

In exercising its discretion with respect to a motion for a preliminary injunction, a district court must give consideration to four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.,* 134 F.3d 749, 753 (6th Cir. 1998).

Mascio, 160 F.3d at 312-13. Federal Rule of Civil Procedure 52(c) "requires a district court to make specific findings concerning each of these four factors, unless fewer are dispositive of the issue." See *In re DeLorean Co.,* 755 F.2d 1223, 1228 (6th Cir. 1985).

In *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. In other words, the first factor of the four-factor preliminary injunction inquiry - whether the plaintiff shows a substantial likelihood of succeeding on the merits - should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second factor - whether the plaintiff will suffer irreparable harm. See id.; see also *Connection Distrib. Co. v. Reno,* 154 F.3d 281, 288 (6th Cir. 1998) (finding that "when a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor"); *Deerfield Med. Ctr. v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981) (holding that if the constitutional right of privacy is either threatened or in fact being impaired, this mandates a finding of irreparable injury). The district court erred in this regard because it considered the second preliminary injunction factor - whether Plaintiffs would suffer an irreparable injury without the injunction - first, claiming that this factor was dispositive.

1. Substantial Likelihood of Plaintiff Succeeding on His Civil Rights Claims Brought Against Defendants

As a public employee, in order to establish a likelihood of success on his § 1983 claim that Defendants denied Plaintiff his First Amendment right to free speech, Plaintiff has to demonstrate that 1) he was disciplined for speech that was directed toward an issue of public concern, and 2) that his interest in speaking as he did outweighed the College's interest in regulating his speech. *See Connick v.*

Myers, 461 U.S. 138, 147-50, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). The inquiry into whether Plaintiff's speech is entitled to protection under the First Amendment as addressing a matter of public concern is a question of law for the court to decide.[5] See *Rankin v. McPherson*, 483 U.S. 378, 383 & 386 n.9, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987). The inquiry into whether Plaintiff's interests in speaking outweigh the College's interests in regulating Plaintiff's speech is a factual determination conducted under the well known Pickering balancing test. *See Pickering*, 391 U.S. at 568. If Plaintiff's interests in the prohibited speech outweigh the College's interests, then Plaintiff's First Amendment rights have been violated. *See Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1186 (6th Cir. 1995). If the First Amendment violation was a substantial or motivating factor in Defendants' disciplinary action against Plaintiff, Defendants may present evidence that they would have disciplined Plaintiff in the absence of his protected conduct. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). However, if Plaintiff's speech does not involve a matter of public concern, it is unnecessary for the court to scrutinize the reason for the discipline. See *Connick*, 461 U.S. at 146.

Many commentators have recently addressed the degree of protection that should be afforded speech in the

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[5] This inquiry remains the same whether the public employee was an untenured teacher. See *Dambrot v. Cent. Mich. Univ.*,55 F.3d 1177, 1185 (6th Cir. 1995) (citing *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972)).

college and university setting, particularly in reference to protected speech as it relates to the prohibition of sexual harassment under Title IX, 20 U.S.C. § 1681.[6] See, e.g, Lisa M. Woodward, Comment, Collision in the Classroom: Is Academic Freedom a License for Sexual Harassment?, 27 Cap. U. L. Rev. 667 (1999); Beverly Earle & Anita Cava, The Collision of Rights and a Search for Limits: Free Speech in the Academy and Freedom from Sexual Harassment on Campus, 18 Berkeley J. Emp. & Lab. L. 282 (1997); Arthur L. Coleman & Jonathan R. Alger, Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses, 23 J.C. & U.L. 91 (1996). Indeed, as one commentator has noted:

> Currently, a debate rages concerning the degree to which speech that is sexually or

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[6] Title IX of the Education Amendments of 1972 was enacted to supplement the Civil Rights Act of 1964's ban on discrimination in the workplace, see *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994), and requires that educational institutions that receive federal funds provide a learning environment free of sex discrimination, including sexual harassment. *See* 20 U.S.C. § 1681(a)(1), (8); (c). Courts have interpreted Title IX cases under Title VII standards. See, e.g., *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996); *Murray v. N.Y. Univ.*, 57 F.3d 243, 249 (2d Cir. 1995) ("In a Title IX case for gender discrimination based upon the sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII."); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316-17 n.6 (10th Cir. 1987). However, the Supreme Court has reserved the question as to whether Title IX actions are governed by Title VII standards. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 n.4, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992).

> racially harassing is protected. And nowhere is that debate more heated than on university campuses, historically committed to unrestricted inquiry and exploring of ideas, yet morally obligated to promoting respect, and legally forbidden from permitting sexual harassment under Title VII and Title IX.

18 Berkeley J. Emp. & Lab. L. at 283 (footnotes omitted).

The Supreme Court has similarly recognized the unique protection afforded speech generally in the academic realm:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago,* 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of our independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would

'materially and substantially interfere with the requirements of appropriate discipline in the operation of a school,' the prohibition cannot be sustained. *Burnside v. Byars,* [363 F.2d 744,] 749 [(5th Cir. 1966)].

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969); see also *Shelton v. Tucker,* 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

In the matter at hand, although we ultimately agree with the district court that Plaintiff's speech was protected as addressing a matter of public concern, the district court made erroneous factual determinations and legally incorrect rulings in rendering its decision which should be noted for the record. Moreover, the district court erred when it found that Plaintiff's interests in speaking as he did outweighed the College's interests in prohibiting retaliation against students who file sexual harassment complaints, maintaining the confidentiality of its students, maintaining a disruption-free environment, and maintaining its federal funding.

a. Was Plaintiff's Speech Protected as Addressing a Matter of Public Concern?

At this juncture, we turn to our analysis of Plaintiff's speech and why we find that a portion of the speech addresses a matter of public concern.[7] Plaintiff's distribution of the

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[7] The concurrence claims that there is an absence of clear guidance from the Supreme Court as to how Connick v. Myers is

Apology along with the student's sexual harassment Complaint to his students, fellow faculty members, and the media, as well as his use of classroom language considered to be obscene and not germane to the course content, are the acts of expression for which he was disciplined and thus are at issue here.[8] See *Johnson v. Lincoln Univ. of the Commonwealth Sys. of Higher Educ.*, 776 F.2d 443, 451 (3d Cir. 1985) ("It is implicit in Connick that the court must examine each activity which the employee claims provided the actual motivation for his termination to see whether it 'touches . . . upon a matter of public concern.'") (quoting *Connick*, 461 U.S. at 149) (alteration in Johnson).

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to be applied in a "mixed speech" case, and that the appropriate course of analysis is to simply assume that Plaintiff's speech was protected. However, contrary to this assertion, *Connick v. Myers* was itself a mixed speech case which in fact provides clear guidance. There, the Court looked at every act of expression, and only after concluding that one of the acts touched upon a matter of public concern, balanced the interests involved. *See* 461 U.S. at 146-49. In doing so, the Court made note of its "responsibility . . . to ensure that citizens are not deprived of fundamental rights by virtue of working for the government . . . ." *Id.* at 147. Accordingly, we would be remiss if we based our analysis upon assumptions rather than the true nature of Plaintiff's speech. *See id.* at 150 (finding that "the state's burden in justifying a particular discharge varies upon the nature of the employee's expression").

[8] The district court failed to consider Plaintiff's classroom speech in the course of issuing the preliminary injunction; however, Plaintiff's classroom speech must be considered where the parties have raised the issue, and where Plaintiff's classroom speech was precipitous of the Complaint and Plaintiff's resulting actions which led to the disciplinary measures.

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48. Speech which can be "fairly considered as relating to any matter of political, social, or other concern to the community" touches upon matters of public concern. *See id.* at 146. Absent unusual circumstances, a public employee's speech dealing with "matters only of personal interest" is not afforded constitutional protection. *See id.* at 147. However, mixed questions of private and public concern, where the employee is speaking both as a citizen as well as an employee, can be protected, see *Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 366 (5th Cir. 2000), such that "if any part of an employee's speech, which contributes to the [disciplinary action], relates to a matter of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education,* 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)." *Rahn v. Drake Ctr., Inc.,* 31 F.3d 407, 412 (6th Cir. 1994); see also *Connick,* 461 U.S. at 147 (finding that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," no First Amendment protection is afforded to the speech); *Johnson,* 776 F.2d at 451 (finding that the fact that a statement evolves from a personal dispute does not preclude some aspect of it from touching upon matters of public concern).

We find the case at hand to be a mixed speech case inasmuch as Plaintiff's speech at issue concerns both private as well as public matters. Stated otherwise, although aspects of Plaintiff's speech involve matters of personal interest where he is speaking regarding a personal grievance as an employee, his speech also involves matters of public interest such that Plaintiff is speaking as a concerned citizen. "Mixed

speech cases are perhaps the most difficult subset of employee speech cases to adjudicate. Because the employee admittedly speaks from multiple motives, determining whether she speaks as a citizen or employee requires a precise and factually-sensitive determination." *Kennedy*, 224 F.3d at 367. However, "whether an employee's statement is predominated by 'the employee's personal interest qua employee' is primarily a content-based inquiry, not an exclusively motive-based inquiry." *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 575 (6th Cir. 1997). In other words, "'the motive which underlies an employee's statements is a relevant, but not necessarily dispositive factor' when considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community." *Id.* at 576 (quoting *Cliff v. Bd. of Sch. Comm'rs*, 42 F.3d 403, 409 (7th Cir. 1994)).

i. "The Complaint"

One of the acts of expression for which Plaintiff was disciplined was his distribution of the sexual harassment Complaint lodged against him. Regarding the content of the Complaint, it is well-settled that allegations of sexual harassment, like allegations of racial harassment, are matters of public concern. See *Connick*, 461 U.S. at 146 (noting that "it is clear that . . . statements concerning the school district's allegedly racially discriminatory policies involved a matter of public concern") (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16, 58 L. Ed. 2d 619, 99 S. Ct. 693 (1979)); *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992) (finding that "reports of sexual harassment perpetrated on [the plaintiff] and other women at [the University of Texas Health Center] - is of great public concern"); *see also Perry v. McGinnis*, 209 F.3d 597, 608 (6th Cir. 2000) (finding that because the plaintiff's complaint

was for race discrimination, it inherently involved a matter of public concern). It is true that the plaintiff alleging a First Amendment violation is usually the person who lodged the sexual or racial harassment complaint, claiming that the employer retaliated against him for filing the complaint; while in the case at hand, it is the person against whom the complaint was made who is claiming a First Amendment violation. However, the lack of parallelism between Plaintiff in this case and the plaintiffs in other cases does not change the fact that the Complaint related to sexual harassment and therefore involves a matter of public import.

The context and form of Plaintiff's speech in this regard require further inquiry. Plaintiff's expression of circulating the sexual harassment Complaint came on the heels of his being called before the College to answer to the allegations made by the complaining student regarding Plaintiff's classroom conduct. Although Plaintiff may have circulated the Complaint in the context of a heated dispute with the College and out of personal animus in retaliation against the complaining student, the fact remains that the context of his circulating the Complaint to faculty members, students, and the media is a matter of public concern where the public - particularly other students attending and planning to attend the College - certainly would be interested in learning the nature of the sexual harassment Complaint lodged against Plaintiff. See *Moore v. City of Kilgore,* 877 F.2d 364, 370-71 (5th Cir. 1989) (finding that the plaintiff's criticism of the fire department to the media addressed a matter of public concern, although the criticisms may have been borne out of the plaintiff's personal disagreement with the fire department's staffing problems, because the public was eager to hear about the ability of the fire department to perform its duties). Accordingly, we believe that Plaintiff's distribution of the Complaint involved a matter of public concern such

that the act of expression was protected under the First Amendment. *See id.*

The district court likewise found that Plaintiff's distribution of the redacted Complaint was protected as a matter of public concern inasmuch as the content, context, and form of the expression dealt with the issue of sexual harassment, and we do not take issue with the district court's findings or holding in this regard. However, the district court's factual findings regarding Plaintiff's distribution of the Apology presents a different case where, although the court ultimately reached the correct conclusion of law, the court's findings were clearly erroneous.

ii. "The Apology"

The district court could not be more incorrect when it found that "the entire eight page Yes, Virginia memorandum does not state that the student had filed a sexual harassment complaint against Bonnell, or even use the term sexual harassment. It is totally directed toward a discussion of the English language." (J.A. at 146.) One need look no further than the second paragraph of the Apology to find the term "sexual harassment" used, and the Apology opens in the first paragraph with a salutation to "Young lady," - obviously in reference to the complaining student - as well as with a reference to the apology that she sought from Plaintiff for his allegedly harassing conduct. (J.A. at 103.) Specifically, the Apology states as follows:

> Young lady, before identifying the clause in the title, and as a preface to the apology that you desire, let me review the two articles of impeachment which you have preferred against me. First, there is the one count of

> buttfucking; second, there are the three counts of blow-job. The first charge all by itself, I must confess, would inspire squeals of protest even from the most asinine, the most cheeky. The second charge, on the face of it, is more than your average mouthful. I marvel at your courage in bringing notice of these alleged outrages to the proper authority, and I am amazed by the modest remedy you require.
>
> In short order, I was summoned before the college's highest tribunal where the grand inquisitor himself, with the support of sundry assistants, subjected me to rigorous cross-examination. I was not informed beforehand as to the specifics of this interrogation, apparently because the examiners were after the truth of the matter and probably felt that the element of surprise would tend more profitably to that end. Professors are rather like politicians: give them ample time to consider any question, they are apt to expatiate ad nauseam. I did know, because of your "formal complaint," what the fundamental charge might be: sexual harassment. But, as that might be anything from gang rape by a branch of the Hell's Angels to an indiscreet plucking at one's own wedgie, I couldn't imagine what witches' spew might be brewing.

(J.A. at 103 (emphasis added).) Indeed, contrary to the district court's finding, the Apology is explicitly directed toward the complaining student, as the salutation indicates and as the entire exposition reiterates. Throughout the entire eight-page Apology, Plaintiff continually refers to the complaining

student as "Virginia," and does so with mockery, disdain, and insults as to her immaturity in bringing the sexual harassment Complaint against Plaintiff. For example, Plaintiff states as follows on the fourth page of the Apology:

> It is true - this is your half of a truth - that I talked about previous hassles with the college administration over some students "lining up" (an obvious exaggeration for comic effect) at some dean's office to complain about the "bad man" with the "potty mouth." And, yes, a semester or more after the fact, I probably dismissed such folks (especially the cowards, the ones who never broach their disaffection in class or at any time to my face) with a gibe, a jeer, a hiss of derision. I tend to get a tad defensive when people don't just disagree with me, my values, my behavior, but who would also campaign for and delight in my utter destruction. Disagreement is fine; I welcome it and always remember to reward it. The clash of ideas and values is usually both exciting and illuminating. But I have never "dressed down," attacked, insulted, or ridiculed any actual student in any actual class. And you know that; you know there can be no corroboration for your arrant lie. (Shame on you, Virginia - so very young and yet so devious).

(J.A. at 106.) Also replete throughout the Apology is the phrase, "I am sorry, Virginia, that you find your own language, the English language, so painful," again directed at the complaining student in reference to the fact that she filed a sexual harassment complaint against Plaintiff for his use of

profanity which she found so offensive that it allegedly created a hostile learning environment. (J.A. at 104, 105, 107.) It is not until that last paragraph of the Apology that Plaintiff identifies the First Amendment, or as Plaintiff coins it, the "sanity clause." (J.A. at 107.) Accordingly, the district court's finding that the Apology is "totally directed toward a discussion of the English language" is clearly erroneous where a review of the Apology on its face does not support this finding.

Based upon its previous finding that the Apology never once mentions the term sexual harassment and is "totally directed toward a discussion of the English language" - the district court went on to find that "this indicates that Bonnell's motive in writing the Yes, Virginia memorandum was not to retaliate for a sexual harassment complaint, but instead to discuss First Amendment concerns in the context of classroom language." (J.A. at 147.) However, at the time of the preliminary injunction hearing, the district court ruled that Plaintiff's motivation in writing the Apology was irrelevant and he refused to allow Plaintiff to be questioned regarding his motivation.[9] Then, despite the court's finding to the

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[9] A sampling of the colloquy provides as follows:

> Q. (to Plaintiff) Why did you write the document [the Apology]?
> MR. WENDT: Same objection.
>
> MR. MATEO: They are saying retaliation. It is relevant for this witness who wrote the document to tell us why.
> THE COURT: I don't think it is relevant. The document speaks for itself. . . . I will sustain the

contrary, in discerning Plaintiff's motive, the district court also found it "important" that at the time Plaintiff wrote the Apology, the Complaint had been decided in his favor. Apparently, the district court was of the opinion that because the outcome of the student's claim against Plaintiff had been decided in his favor, Plaintiff could not have been motivated by retaliation in writing the Apology. However, Plaintiff expressly states in the Apology that he was on the "defensive" because of the Complaint lodged against him, and Plaintiff expressly testified that at the time he wrote the Apology, he did not know the outcome of the sexual harassment Complaint. (J.A. at 107, 697.) Furthermore, Plaintiff could have sought to retaliate against the student and the College regardless of the actual outcome of the matter.

The district court then based its conclusion of law that Plaintiff's Apology was protected under the First Amendment as a matter of public concern on its finding that Plaintiff's motive in writing the Apology was to discuss the First Amendment in the context of classroom language. However, as previously indicated, an employee's motivation in speaking is not dispositive as to whether the speech was protected, thereby making the district court's basis for its conclusion of law erroneous. *See Chappel,* 131 F.3d at 574 (finding that "the argument that an individual's personal motives for speaking may dispositively determine whether that individual's speech addresses a matter of public concern [to be] plainly illogical and contrary to the broader purposes of the First Amendment"). And, also as indicated, the district court refused to allow Plaintiff to be questioned as to his

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objection.

(J.A. at 699.)

motive in writing and distributing the Apology on the basis that Plaintiff's motive was "not relevant."

Despite these erroneous factual findings and the erroneous legal premise upon which the court based its conclusion of law, we believe that the district court properly concluded that Plaintiff's speech was protected under the First Amendment because the Apology - although expressed as a satirical diatribe fraught with references to Plaintiff's personal disagreement with the student's characterization and reaction to his classroom language - addressed a matter of public concern.

Regarding the content of the Apology, it is true that Plaintiff apparently crafted the title in response to the remedy sought by the complaining student; that he addresses the Apology to the complaining student, albeit under the pseudo-name "Virginia" in order to create a sarcastic spoof on the editorial, "Yes, Virginia, There is a Santa Claus;" and that he criticizes both the student and the sexual harassment Complaint that she filed against him, as well as the College's disciplinary measures taken in response to the Complaint, all in relation to the First Amendment - which Plaintiff describes as "the Sanity Clause." While the content of the Apology appears to be a personal attack on the various parties involved, the content also addresses the College's sexual harassment policy as it relates to classroom language. For example,

> It says, after all, in the cover letter to the college's "Revised sexual harassment policy" (July 30, 1997) that "Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by

professional standards will lead to the imposition of discipline."

But you see, Virginia, this sort of legalese is variantly known in the grown-up, adventitiously sane, world as bullshit. Profanity, vulgarity (I'm especially fond of this one, since it ensnares virtually everyone in its aristo-analcratic web; look it up, and you'll see what I mean. You will think: "sump'n' ain't right here," and you'll ~~be right~~, and wrong, altogether.), and obscenity (this one's a doozy, too. "Inciting lustful feelings; lewd," is the second definition. The other applications are reminiscent of "vulgar." The only persons in my classes who are stirred, in any antisocial sense, by my diction are either the very unfortunately "wired," on the one hand, or the very young, Virginia, on the other.) - all these are in the eye of the beholder. That's why even so august a body as the U.S. Supreme Court has continually tied itself into comical knots trying to sort out the sordid, parse the putrid, and teet the totter. That which is "germane to course content" is best left to the professional (more on "academic freedom" later), while "imposition of discipline" is reserved for the amusement of inquisitors.

(J.A. at 103-04.)

A review of the Apology also indicates that Plaintiff was speaking as a concerned citizen about the importance of the right to free speech under the First Amendment, and the need to protect that right in society. For example, Plaintiff wrote as follows:

> So, then to conclude this my apologia. I am sorry, almost ineffably sorry, that you find our language, the English language, so painful. You will never have the power, of course, to

> restrict it, or to kill part of it, as you wish. Nor am I possessed of the tongue of men and of angels, so as to protect it from you or all the tribe of its detractors. It will continue to wend its way and may even find complete vindication, one day, from its shaky jurisprudential custodians. I will probably not see that day, as it lies somewhere beyond the frenetic millennial epoch. But you may. Hopefully, by then, you will have learned to appreciate it. Maybe, then, you will understand that life without the fullness of your language's energy would be like that life Khalil Gibran says languishes without love: life where you may still laugh, but not all of your laughter; where you may still cry, but not all of your tears.

Oh! - the sanity clause! Virginia, I almost forgot! Here it is: "Congress shall make no law . . . abridging the freedom of speech . . . ." This has driven the thought police, the language censors, and all deputy inquisitors beyond despair, into madness. If I had access to your Christmas stocking, I would stuff it there. When, at length, you grow up, you will cherish it above every other gift, save love itself. Cheers.

(J.A. at 107.)

As noted at the outset of our analysis, the debate of constitutionally protected speech in the classroom setting -- particularly as it relates to sexual harassment and a college's obligations under Title IX -- is a heated one where the most learned of academic institutions struggle to find a common ground. Therefore, speech which sets forth the type of remarks that served as the catalyst to a sexual harassment

complaint lodged against a college professor, and the professor's reaction thereto, is speech which can "fairly be considered as relating to any matter of political, social, or other concern to the community. " *Connick,* 461 U.S. at 146 & 147-48. Said differently, the subject of profane classroom language which precipitates a sexual harassment complaint lodged against the instructor for his use of this language in relation to the First Amendment, as well as the sanctity of the First Amendment in preserving an individual's right to speak, involves a matter of public import. *See Wilson,* 973 F.2d at 1269. Stated more broadly, there is a public interest concern involved in the issue of the extent of a professor's independence and unfettered freedom to speak in an academic setting.

The context and form of Plaintiff's circulation of the Apology was public in nature such that Plaintiff distributed the Apology to the College's more than two hundred faculty members as well as to two local television stations and a local newspaper, thereby bringing to light the subject of allegedly profane classroom language which led to the filing of a sexual harassment complaint. Although it is true that finding speech to be a matter of public concern does not turn on communication of the speech to the public, see *Johnson v. Univ. of Cincinnati,* 215 F.3d 561, 585 (6th Cir. 2000), and that a "finding of public concern is . . . strengthened by the fact that the plaintiff did not solicit the attention of the media, but simply responded to questions regarding the existing controversy," see *Matulin v. Vill. of Lodi,* 862 F.2d 609, 613 (6th Cir. 1988), we believe that Plaintiff's circulation of the Apology was in the context of bringing the issue to the fore as a matter of public interest.

The district court found - by virtue of its own devices and not based upon Plaintiff's testimony - that Plaintiff's

motivation, or the context in which he circulated the Apology, was to discuss the bounds of the First Amendment, which thereby rendered Plaintiff's speech a matter of public import. We have two concerns regarding the district court's assessment. First, as noted, a speaker's underlying motivation in expressing himself as he did, although relevant, is not dispositive of the issue of whether the act of expression addresses a matter of public concern. *See Chappel,* 131 F.3d at 574. Second, we do not believe that the record supports a finding that Plaintiff's motivation in circulating the Apology was necessarily only one of public interest.

Based upon the nature of the Apology, one could conclude that Plaintiff was motivated by personal animus against the complaining student as well as against the College for its reaction to her Complaint, and that he circulated the Apology as a retaliatory gesture against these parties. Indeed, in the Apology Plaintiff states that until the formal Complaint had been lodged against him, he had ignored similar complaints made by students. In other words, until the formal complaint was filed and the College acted upon it, Plaintiff did not react to similar complaints made by students, suggesting that Plaintiff's reaction in this case was simply in response to his discontent with the College's discipline. However, even assuming that Plaintiff was motivated by personal animus in circulating the Apology, the fact remains that in doing so, he addressed a matter occurring at the college which was of public concern.

In *Perry v. McGinnis*, this Court recently rejected the argument that because the plaintiff brought his race discrimination complaint in the context of an internal grievance with his employer, the complaint did not address a matter of public concern. *See* 209 F.3d at 608. The Perry Court noted that in Chappel we clarified that "the fundamental

distinction recognized in Connick is the distinction between matters of public concern and matters only of personal interest, not civic-minded motives and self-serving motives." *Id.* (citing *Chappel,* 131 F.3d at 575) (citing *Azzaro v. County of Allegheny,* 110 F.3d 968, 979 n.5 (3d Cir. 1997) (**en banc**)). Accordingly, the Perry Court went on to conclude that "whether Perry's racial discrimination complaint was borne out of civic-minded motives or of an individual employment concern is irrelevant. What is relevant is that the subject of Perry's complaint was racial discrimination - a matter inherently of public concern, according to the Supreme Court." 209 F.3d at 608-09 (citing *Connick*, 461 U.S. at 148 n.8). And so it goes that in the case at hand, although Plaintiff may have circulated the Apology in the context of a self-serving motive, it nonetheless remains that the subject of the Apology - classroom language by a college professor which led to the filing of a sexual harassment complaint by one of his students for which he was disciplined, all in relation to the First Amendment - inherently touches upon a matter of public concern.

We are further persuaded in this regard by the Fourth Circuit's opinion in *Seemuller v. Fairfax County Sch. Bd.,* 878 F.2d 1578 (4th Cir. 1989). There, a high school physical education teacher alleged that his First Amendment rights were violated when he did not receive his wage step increase because he wrote a satirical letter to the school newspaper commenting on allegations of sex discrimination against female students by teachers in the physical education department. *See id. at 1579.* Specifically, the teacher was responding to a letter in the school newspaper which complained about "a few male chauvinistic P.E. teachers." *Id.* Before the teacher's satirical response was published in the school newspaper, both the paper's faculty advisor as well as the school's principal read the letter and did not object to it.

Id. In addition to being published in the school paper and distributed to the students at the high school, the letter was mailed to approximately 3,600 families in the school's community. *Id.* at 1580.

After distribution, the principal informed the teacher that he had received complaints from the community, faculty members, and others. *See* id. The principal also stated that the teacher may receive a "needs improvement" rating in "Professional Responsibility" on his evaluation, and suggested that the teacher meet with the human relations committee and write a letter of apology to the newspaper. *Id.* The teacher complied on both measures. *Id.* However, in his performance evaluation, the teacher received the "needs improvement" rating, despite his letter of apology, and did not receive his wage step increase. *Id. at 1580-81.* The teacher filed suit alleging violation of his First Amendment rights. *Id.* The district court held for the school on the basis that the speech did not involve a matter of public concern, but the Fourth Circuit reversed. *Id.* at 1582. The Fourth Circuit found that the teacher's letter involved a matter of public concern because it addressed the issue of sex discrimination in the physical education department, or the treatment of females in school programs. *Id.* at 1583. Accordingly, it follows that Plaintiff's Apology, which addressed an allegation of sexual harassment, and therefore the treatment of females at the College, similarly addressed a matter of public concern. Moreover, in the case at hand, the Apology went one step further and addressed issues of public concern such as the sanctity of the First Amendment.

iii. "Classroom Language"

Finally, we turn to Plaintiff's classroom language which gave rise to the sexual harassment complaint and the

disciplinary measures. The content of Plaintiff's language at issue is what the College terms profanity not "germane to course content."[10] *See*, e.g., March 4, 1998 Memorandum from MacQueen to Plaintiff entitled "Obscene and vulgar speech" (cautioning Plaintiff that "unless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as 'fuck,' cunt,' and 'pussy' may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment"). In other words, it was not the content of Plaintiff's speech itself which

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[10] The College's sexual harassment policy provides in relevant part:

> For purposes of this policy, the term "sexual harassment" means . . . unwelcome verbal . . . conduct or communication of a sexual nature when: . . . (b) Such conduct or communication has the purpose or effect of unreasonably interfering with an individual's employment or education by creating an intimidating, hostile, abusive, or offensive work or educational environment.
>
> This policy does not apply to speech protected by the Constitutions of the United States or the State of Michigan. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material. Thus, speech in the classroom which is germane to course content is not subject to this policy. Reasonable care must be exercised in applying this policy to avoid violation of 1st Amendment rights.

led to the disciplinary action; rather, it was the context and form in which Plaintiff used the speech -- i.e., in the course of his teaching where the language was not germane to the course content -- that the College found to be in violation of its sexual harassment policy.

(J.A. at 355.)

The context in which a message is delivered is often the pivotal factor when determining whether the speech will be protected. As the Supreme Court recently opined:

> The protection afforded to offensive messages does not always embrace offensive speech that is so intrusive that the unwilling audience cannot avoid it. Indeed, it may not be the content of the speech, as much as the deliberate verbal or visual assault, that justifies proscription. Even in a public forum, one of the reasons we tolerate a protestor's right to wear a jacket expressing his opposition to government policy in vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes.

Hill v. Colo., 530 U.S. 703, 120 S. Ct. 2480, 2489, 147 L. Ed. 2d 597 (2000) (citations and internal quotation marks omitted). Nearly a century before Hill was decided, Justice Holmes likewise opined that "the character of every act depends upon the circumstances in which it was done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force." *See Schenck*

v. United States, 249 U.S. 47, 52, 63 L. Ed. 470, 39 S. Ct. 247 (1919) (citations omitted).

The degree of protection afforded to a college professor's speech in the context of the classroom was addressed by the Fifth Circuit in *Martin v. Parrish*, 805 F.2d 583, 584-85 (5th Cir. 1995). There, the plaintiff was discharged from his teaching position at a college for his incessant use of profanity in the classroom. *Id.* In finding that the speech was not protected, the Fifth Circuit took into account the unique context in which a college professor speaks such that his students are a "captive audience" who may find themselves intimidated by the person who has the ability to pass upon them a poor grade. Specifically, in Martin the plaintiff teacher denigrated his students with profanity such as "bullshit," "hell," "damn," "God damn," and "sucks," allegedly because the students had a poor attitude. The plaintiff brought a § 1983 claim against the college for violation of his First Amendment rights; the district court held that the plaintiff did not have a constitutionally protected right to use profanity in the classroom; and the Fifth Circuit agreed. *See id.* at 585. The Court held that the teacher's speech did not touch upon a matter of public concern because the profanity served only to reflect the teacher's attitude toward his students. *Id.* In connection with its holding, the Court recognized that the students were a "captive" audience, and that they "paid to be taught and not vilified in indecent terms . . . ." *Id.* at 586. In short, the Court held that the teacher's "language is unprotected . . . because, taken in context, it constituted a deliberate, superfluous attack on a 'captive audience' with no academic purpose or justification." *Id.*

In Dambrot v. Central Michigan University, we relied upon the Fifth Circuit's decision in Martin when we held that

the coach of a state university basketball team did not engage in protected speech when he used the word "nigger" during a locker room session allegedly to motivate his basketball players. *See* 55 F.3d 1177, 1180 (6th Cir. 1995) ("You know we need to have more niggers on our team . . . . Coach McDowell is a nigger, ... Sander Scott who's an academic All-American, a Caucasian, I said Sander Scott is a nigger. He's hard nose, [sic] he's tough, et cetera."). The coach was discharged by the university for this speech and he filed suit alleging that his discharge violated the First Amendment. The district court granted the university's motion for summary judgment and this Court affirmed. Relying upon Martin, the Court concluded as follows:

> The First Amendment protects the right of any person to espouse the view that a "nigger" is someone who is aggressive in nature, tough, loud, abrasive, hard-nosed and intimidating; someone at home on the [basketball] court but out of place in a classroom setting where discipline, focus, intelligence and interest are required. This same view has been and is held about African Americans by many who view the success of Black athletes as a result of natural athletic ability and the success of Black executives as the result of affirmative action.

What the First Amendment does not do, however, is require the government as employer or the university as educator to accept this view as a valid means of motivating players. An instructor's choice of teaching methods does not rise to the level of protected expression. . . . The University has a right to disapprove of the use of the word "nigger" as a motivational tool just as the college in Martin was not forced to tolerate profanity.

55 F.3d at 1190-91 (citation omitted; emphasis added).

The Dambrot Court also rejected the coach's argument that his speech was protected under the realm of "academic freedom." 55 F.3d at 1188. "The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Id.* (citing *Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir. 1990)). The Court then noted that the "linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." To this end, the Court concluded that, unlike the case of *Levin v. Harleston*, 966 F.2d 85 (2d Cir. 1992), and *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir. 1994), vacated and remanded, 513 U.S. 996 (1994), rev'd 52 F.3d 9 (2d Cir. 1995) - where the speech of college professors who made derogatory comments about persons of certain racial or ethnic groups was found to serve the purpose of advancing viewpoints, however repugnant, which had as their purpose influencing or informing public debate - the coach's speech did not have such a purpose. 55 F.3d at 1189.

Turning to the matter at hand, just as a university coach may have the constitutional right to use the word "nigger," but does not have the constitutional right to use the word in the context of motivating his basketball players, *see* 55 F.3d at 1190; so too, Plaintiff may have a constitutional right to use words such as "pussy," "cunt," and "fuck," but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy. *See id.; see also FCC v. Pacifica Found.*, 438 U.S. 726, 747, 57 L. Ed. 2d 1073, 98 S. Ct. 3026 (1978) (finding speech that is "'vulgar,' 'offensive,' and 'shocking' . . . is

not entitled to absolute constitutional protection under all circumstances"). This is particularly so when one considers the unique context in which the speech is conveyed -- a classroom where a college professor is speaking to a captive audience of students, *see Martin,* 805 F.2d at 586, who cannot "effectively avoid further bombardment of their sensibilities simply by averting their [ears]." *Hill,* 120 S. Ct. at 2489. Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the clash of viewpoints are encouraged - if not necessary -- to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection. *See Pacifica,* 438 U.S. at 747.

To summarize, although we find Plaintiff's classroom profanity that was not germane to the subject matter to be unprotected speech, we are also of the belief that Plaintiff's acts of expression in circulating the Complaint and the Apology were protected as addressing matters of public concern. Because parts of Plaintiff's speech for which he was disciplined addressed a matter of public concern, we are required to conduct a balancing of the parties' respective interests as set forth in *Pickering v. Board of Education. See Connick,* 461 U.S. at 149; Rahn, 31 F.3d at 411.

b. Was Plaintiff's Interest as a Citizen in Speaking on a Matter of Public Concern Greater than the College's Interest in Promoting the Efficiency of the Service that

it Performs through its Employees?

In *Pickering*, the Supreme Court developed a balancing test which weighed "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *See Pickering*, 391 U.S. at 568. The district court failed to properly apply *Pickering* because the court never balanced the parties' respective interests; instead, the court appears to have assessed whether Plaintiff actually violated the College's sexual harassment policy by retaliating against the complaining student. Indeed, nowhere in the district court's opinion does it balance the interests involved; the court simply concludes that "the issue is whether the First Amendment protects the publication of [Plaintiff's] Yes, Virginia memorandum attached to a copy of the sexual harassment complaint filed against him that redacts the name of the complainant and her class. The Court holds that it does. Based on content, form, and context of the distribution, [Plaintiff's] speech relates to matters of a public concern, and was not done in retaliation for a complaint of sexual harassment." (J.A. at 150.)

The district court misses the mark in its analysis and erroneously applies the relevant legal standard, which could possibly account for its erroneous decision to grant the preliminary injunction in this case. Specifically, the court failed to conduct a meaningful balancing of the interests involved in order to determine whether the College's interests in enforcing its policy outweighed Plaintiff's interests in speaking.

i. Interests of the Parties Involved

Plaintiff claims that his interests in free speech and academic freedom outweigh the College's stated interests in regulating Plaintiff's speech. Defendants contend that their interests in 1) disciplining Plaintiff for conduct that threatened the College's eligibility for receiving federal funding under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g *et seq.*, which forbids the release of educational records and the release of personally identifiable information absent prior written authorization; 2) prohibiting retaliation against students who file sexual harassment complaints, as expressly prohibited by the College's sexual harassment policy; 3) maintaining the confidentiality of a student complaint, as provided by Article VII.A.7. of the CBA between the College and Plaintiff's union, MCCFO; and 4) maintaining a learning environment free of faculty disruption, outweigh Plaintiff's interests which Defendants claim are negligible.

A college's or university's interest in maintaining a hostile-free learning environment, particularly as it relates to its Title IX funding, is well recognized. However, the interests of allowing persons to speak freely in the college and university setting are equally as well-established such that the baiancing of these interests is not an easy one where even the most revered universities struggle with creating a sexual harassment policy that preserves this delicate balance. See, e.g., 18 Berkeley J. Emp. & Lab. L. at 306-19 (noting the sexual harassment policies of various institutions including Stanford University and Harvard Law School). Organizations such as the American Civil Liberties Union ("ACLU") and the American Association of University Professors ("AAUP") recognize that limitations must exist on college professors' speech in order to provide a learning environment free of harassment; however, such organizations maintain that the limitations must be narrowly drawn so as not to compromise

the professors' rights to academic freedom. *See id.* at 296-97. For example, the ACLU has opined that "[a] sexual harassment policy . . . in an academic setting must be drawn very narrowly . . . [where it is] limited to situations where a practice of . . . sexually derogatory comments is . . . so pervasive and abusive as to demonstrably hinder the learning experience." *Id.*

Although it is true that the complaining student in the case at hand filed her sexual harassment Complaint against Plaintiff with the College and not under Title IX, the College nonetheless took disciplinary action against Plaintiff in light of the College's policy against sexual harassment, and the same concerns thereby apply. Indeed, the inquiry and the concerns are the same whether the sexual harassment claim is brought pursuant to Title IX or pursuant to an internal sexual harassment policy. *See Richard H. Hiers*, Academic Freedom in Public Colleges and Universities: O Say, Does that Star-Spangled First Amendment Banner Yet Wave?, 40 Wayne L. Rev. 1, 48 (1993) (recognizing that teachers sanctioned for exercising what they believe to be constitutionally protected speech face the same legal hurdles of *Connick, Pickering, and Mt. Healthy*). This, along with the College's interests in maintaining the confidentiality of a student complaint as set forth in the CBA, protecting a complaining student from retaliation, and continuing its public funding are all interests which we find to be significant in "promoting efficiency and integrity in the discharge of [the College's] official duties . . . ." *Connick*, 461 U.S. at 150-51 (internal quotation marks omitted).

Plaintiff claims that his interest in free speech under the First Amendment and his interest in academic freedom outweigh Defendants' purported interests. Academic freedom is "a special concern of the First Amendment, which does not

tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967); *see also Shelton v. Tucker,* 364 U.S. 479, 487, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960); *Sweezy v. N.H.,* 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957) (plurality opinion). Although academic freedom is not "an independent First Amendment right," *see Bishop v. Aronov,* 926 F.2d 1066, 1075 (11th Cir. 1991), the Supreme Court has long recognized the significance of academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Sweezy, 354 U.S. at 250. However, the Supreme Court has also recognized that "academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself." *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 226 n.12, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985) (citations omitted); *Sweezy,* 354 U.S. at 263 (Frankfurter, J. concurring) ("[The university atmosphere] is an atmosphere in which there

prevail the four essential freedoms of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.") (internal quotation marks omitted).

Similarly, this Court has recognized that the term academic freedom "'is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict.'" *See Parate v. Isibor*, 868 F.2d 821, 826 (6th Cir. 1989) (quoting *Piarowski v. Ill. Comm. College Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985)). Although the College is not claiming an interest in academic freedom *per se* in support of its position in the matter at hand, it is important to bear in mind that a professor's right to academic freedom is not absolute, and the "autonomous decisionmaking" of the College must be considered when balancing the parties' respective interests. *See Ewing*, 474 U.S. at 226 n.12.

ii. Balancing of the Interests

The balancing of interests between a faculty member's right to free speech and a college's or university's right in preserving its interests has recently been described as follows:

> Free speech rights stemming from the First Amendment apply to both students and faculty members on public colleges and university campuses. . . . However, those rights are not absolute. The objectives that underscore the First Amendment also reflect and reinforce the educational mission of colleges and universities. These objectives include

> advancement of a representative democracy and self-government; the pursuit of truth in the marketplace of ideas; and the promotion of individual self-expression and development. Constitutional protection is afforded to the open and robust expression and communication of ideas, opinions, and information to further each of these objectives. This protection parallels a central mission of higher education: to nurture and preserve a learning environment that is characterized by competing ideas, openly discussed and debated.

Arthur L. Coleman & Jonathan R. Alger, Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses, 23 J.C. & U.L. 91, 98-99 (1996) (footnotes omitted).

In the matter before us, we believe that Defendants' purported interests, including maintaining the confidentiality of student sexual harassment complaints, disciplining teachers who retaliate against students who file sexual harassment claims, and creating an atmosphere free of faculty disruption, outweigh Plaintiff's purported interests. As noted by the several commentaries cited above, colleges and universities are legally required to maintain a hostile-free learning environment and must strive to create policies which serve that purpose. While a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment. To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to

sexually harass students secure in the knowledge that whatever they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests. *See* 18 Berkeley J. Emp. & Lab. L. at 320 (["The First Amendment and] academic freedom must not be used to shield the abuse of a captive audience by racially or sexually derogatory epithets.").

Speech that rises to the level of harassment -- whether based on sex, race, ethnicity, or other invidious premise -- and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing. The line drawn as to whether a professor's speech rises to this level is to be decided on a case by case basis, and in the instant case Plaintiff is not challenging the constitutionality of the College's sexual harassment policy. Our task today is to balance the parties' respective interests under the facts of this case and, in doing so, we believe that the College's interest in preserving a learning environment free of sexual harassment, among others, outweighs Plaintiff's claimed free speech and academic freedom interests. As we acknowledged at the outset of this opinion, although this balance is a delicate one, we believe that the College's interests prevail under the facts and circumstances presented here.

c. Summary

The district court erred in concluding that Plaintiff demonstrated a substantial likelihood of succeeding on the merits of his First Amendment claim; although Plaintiff's speech addressed a matter of public concern, Plaintiff failed

to show that his interests in speaking outweighed the College's interests in enforcing its policies.

It should be noted that Defendants' assertion of qualified immunity provides another basis as to why Plaintiff's claim may fail. It is well-established that the defense of qualified immunity grants government officials engaged in discretionary activities immunity from individual liability for civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). The Court applies a two-part test to determine whether a government official is entitled to the affirmative defense of qualified immunity. *See Summar v. Bennett,* 157 F.3d 1054, 1057 (6th Cir. 1998). The first inquiry is whether the Plaintiff has shown a violation of a constitutionally protected right; and the second inquiry is whether that right was clearly established at the time such that a reasonable official would have understood that his behavior violated that right. *See id.* at 1058.

To determine whether a right was clearly established for purposes of qualified immunity, we "look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits." *Chappel,* 131 F.3d at 579. No decisions from the Supreme Court, our circuit, or any other court, clearly establish that Plaintiff's speech in the instant case was constitutionally protected so that Defendants would have understood that their disciplinary action violated Plaintiff's rights. Thus, Defendants may be entitled to qualified immunity, and this could provide yet another basis for concluding that Plaintiff has not shown a substantial likelihood of success on the merits of his claim. *See Cohen v. San*

Bernardino Valley Coll., 92 F.3d 968, 972-73 (9th Cir. 1996) (holding that the defendant community college board of trustees was immune from the plaintiff-teacher's § 1983 suit for violation of his First Amendment rights in relation to the discipline that the teacher received for responding to a student's sexual harassment claim because the defendants could not have reasonably known that the discipline violated an established right).

Having found that Plaintiff has failed to show a substantial likelihood of succeeding on the merits of his First Amendment claim, this preliminary injunction factor is thus dispositive of the issue, and we need not address the remaining three factors. *See In re DeLorean Co.*, 755 F.2d at 1228. However, because the district court made specific findings on the remaining factors, we shall do the same.

2. Whether Plaintiff Would Suffer Irreparable Harm Without the Injunction

When addressing this factor, the district court began by noting that "Sixth Circuit authority is clear that a nontenured teacher does not have a constitutional right to teach a particular class. *See Parate v. Isibor*, 868 F.2d 821, 832 (6th Cir. 1989)." (J.A. at 134.) After acknowledging this premise, the district court went on to state, without any supportive authority, that because Plaintiff "is a professor under continuing contract at MCC and indeed has been teaching there for 32 years, . . . he has a right to continued employment at MCC." (J.A. at 134.) Then, relying upon *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), the district court stated that "although [Plaintiff] does not have a liberty interest in his teaching position, if he was suspended for First Amendment

activities then he has established irreparable harm." (J.A. at 134.)

We find the district court's opinion misguided in this regard. First, the district court takes the preliminary injunction factors out of sequence claiming that the irreparable harm inquiry is determinative; then the court finds, without any legal support, that because Plaintiff has been teaching under a contract for thirty-two years, he has a right to continued employment; then the court finds that Plaintiff does **not** have a liberty interest in his teaching position; and then the court goes on to say that despite the lack of a liberty interest in his teaching position, if Plaintiff can succeed in showing that he was suspended in violation of his First Amendment rights, he can show irreparable harm - which brings us right back to the first preliminary injunction factor which the district court should have considered at the outset. To further complicate matters, the district court never addressed the harm that Plaintiff would allegedly suffer if the injunction was not granted. It merely concluded that "[Plaintiff would] suffer irreparable injury if he was suspended for engaging in First Amendment activities."

Apparently, the district court was attempting to show that because Plaintiff is not tenured, it is unlikely that he would succeed on his § 1983 claim for violation of his Fourteenth Amendment rights, absent a showing that his First Amendment rights were violated. This is a correct proposition of law, *see Mt. Healthy,* 429 U.S. at 283-84, and would likely be true if Plaintiff could succeed on his First Amendment claim. *See*, e.g., *Connection Distributing Co.*, 154 F.3d at 288. However, we do not believe that Plaintiff has shown a substantial likelihood of succeeding on the merits of his First Amendment claim, and where the injury is purely economic in nature, a preliminary injunction is not necessary

in any event. *See Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). To that end, Plaintiff would not have suffered irreparable harm had the injunction been denied insofar as the little more than four months' suspension Plaintiff received without pay was compensable with monetary damages. Although Plaintiff contends that harm would have resulted without the injunction because his teaching style was being interfered with and his First Amendment rights were being violated, Plaintiff has not shown that his speech was protected by the First Amendment.

3. Whether Issuance of Injunction Will Cause Harm to Others &

4. Whether Public Interest Would be Served by Issuance of the Injunction

The district court found that the issuance of the injunction would not cause harm to the College, and that the public interest would be served by issuance of the injunction because the First Amendment interests of Plaintiff and the public would be advanced. However, as we explained when balancing the parties' interests in this case, the injunction may cause harm to the students because without the College's enforcement of the sexual harassment policy and measures to protect its students from retaliation by a disgruntled professor, students may be forced to endure a hostile learning environment and may be intimidated into remaining silent. Moreover, without proper investigation of the sexual harassment Complaint, and appropriate response thereto, the College potentially compromises some of its funding. We do not find that Plaintiff's alleged harm outweighs the potential harm to others. *See United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 362 (6th Cir. 1998) (noting that the harm to the

plaintiff's "First Amendment rights should the preliminary injunction not be issued must be weighed against the harm to others from the granting of the injunction").

Overall, the public interest would not be served in issuing the injunction. The very reason that allegations of sexual harassment inherently address a matter of public concern is because of the public interest in knowing that such goings on are properly investigated and not allowed to continue in any given arena. By issuing the injunction in this case, the district court usurped the College's attempt at maintaining a learning environment free of harassment and hostility in accordance with its sexual harassment policy. Again, we are not being asked to adjudicate the propriety of the College's sexual harassment policy. To the extent that the policy is in place, and that the College repeatedly warned Plaintiff that his actions were in violation thereof, we do not believe that the public interest was served by enjoining the College from enforcing its policy.

As we stated at the outset of this discussion, a preliminary injunction is reserved for only the most egregious case, and should not be extended to cases which are doubtful or do not come within well-established principles of law. *See Detroit Newspaper Publishers. Ass'n,* 471 F.2d at 876. Plaintiff's suspension without pay from his teaching position at a community college "commencing August 18, 1999 and ending December 18, 1999" wherein Plaintiff's fringe benefits remained in effect, did not rise to the level of requiring such extraordinary relief, particularly in a case such as this where it was not well-established whether the acts of expression for which Plaintiff was disciplined were protected under the First Amendment.

CONCLUSION

The district court's order granting Plaintiff's motion for a preliminary injunction was based upon clearly erroneous findings of fact and an erroneous application of the law. In conducting the appropriate analysis, we hold that a balance of the four preliminary injunction factors weighs in favor of the College inasmuch as Plaintiff failed to show a substantial likelihood of success on the merits; he has not shown that he will suffer irreparable harm if the College continues to enforce its sexual harassment policy; the injunctive relief may result in harm to others; and the public interest will be served by denying the injunctive relief.

We wish to emphasize that in seeking to strike the appropriate balance here today, we have carefully considered the parties' respective interests and have not taken our task lightly. Just as we "hope that whenever we decide to tolerate intolerant speech, the speaker as well as the audience will understand that we do so to express our deep commitment to the value of tolerance - a value protected by every clause in the single sentence called the First Amendment[,]" *see* Edward J. Cleary, Beyond the Burning Cross 198 (1995) (quoting speech of Justice Stevens); we also hope that whenever we decide that intolerant speech should be restricted, it is understood that we do so with no less commitment to the value of tolerance and the First Amendment in which it is enshrined.

Accordingly, for the above stated reasons, we **REVERSE** the district court's order granting Plaintiffs' motion for injunctive relief as to Plaintiff John Bonnell, and we **REMAND** the case for further proceedings consistent with this opinion.

CONCURBY:

DAVID A. NELSON

CONCUR:

DAVID A. NELSON, Circuit Judge, concurring. I concur in the judgment and in much of the court's opinion. I am somewhat ambivalent, however, about our holding that the acts of insubordination committed by Professor Bonnell in publicizing his student's sexual harassment complaint - a breach of confidentiality against which he had repeatedly been warned - like his promiscuous broadcasting of the screed in which he sought to justify both the classroom recitals of his own sexual escapades and the apparently gratuitous use of coarse language in the classroom, rose to the level of speech in which the professor was expressing himself "as a citizen" on "matters of public concern."

The matters in question were obviously of intense concern to Professor Bonnell himself. As Bonnell explained in his apologia, he "tends to get a tad defensive when people don't just disagree with me, my values, my behavior, but who [sic] would also campaign for and delight in my utter destruction." The professor was clearly not disposed to let himself be destroyed without a fight.

But an employee against whom disciplinary proceedings are brought for speaking on matters of personal concern is not always entitled to claim the highest degree of First Amendment protection for his speech. The key determinant of the type of protection extended to employee speech, as I understand what the Supreme Court held in *Connick v. Myers,* 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), is whether the employee speaks "as a citizen upon matters of public concern" or speaks "as an employee upon matters only of personal interest . . . ." *Id.* at 147. The

dichotomy between "citizen" and "employee," in this formulation, seems no less pertinent than the dichotomy between "public concern" and "personal interest."

The record before us makes it evident, I believe, that Professor Bonnell was not speaking "as a citizen" in the ordinary sense of that term. He was speaking, rather, "as an employee" with an absorbing personal interest in his raunchy classroom rhetoric, in his disgusted student's demand that he be fired immediately, and in his own professional survival.

It would not be accurate to say, however, that Professor Bonnell confined himself to matters "only" of personal interest. The professor seems to believe in the virtue, if that is the word, of what Senator Moynihan called "defining deviancy down." Professor Bonnell further believes that his status as an intelligent and articulate academician and a "fine teacher"[1] means that the people who pay his salary have no right to require him to eschew scatological and sexual vulgarity that is not germane (at least in the view of those whose job it is to represent the taxpayers) to the content of the course he has been hired to teach. These and related beliefs to which Professor Bonnell adheres are argued forcefully in his "Apology" - and whatever the merit of these somewhat curious beliefs, it seems to me that the Apology does touch on matters of public concern.

If our disposition of the appeal had necessarily turned on our answer to the question whether Professor Bonnell was speaking "as a citizen" upon matters of public concern, I

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[1] The quoted evaluation of Professor Bonnell's pedagogy comes from Bonnell himself. We have no reason to doubt the accuracy of his self-assessment.

should probably have swallowed hard - thinking uncharitable thoughts about the nature of the assignment given us - and answered in the affirmative. As it happens, however, the outcome of the appeal would be no different if we answered the question otherwise - if we held, *i.e.*, that Professor Bonnell was speaking "as an employee" upon matters only of personal interest. Either way, given the inevitable result of our balancing of the parties' respective interests under *Pickering v. Bd. of Educ.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), the order granting a preliminary injunction would have to be reversed. That being so, and in the absence of clear guidance from the Supreme Court on how *Connick v. Myers* is supposed to be applied in a "mixed speech" case such as this, my preference would be simply to assume the answer to the *Connick* question without undertaking to decide it. Just as hard cases make bad law, it seems to me that delphic questions can make bad law too. I prefer to duck such questions when I can.

That said, I reiterate my complete agreement with the outcome announced here. This, as I see it, is a case where the legitimate interests of the employer far outweigh those of the employee, and the decision to reverse the injunction granted by the district court certainly seems correct to me.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

CIVIL ACTION NO. 99-71155
August 27, 1999, Decided

PROFESSOR JOHN C. BONNELL and NANCY L. BONNELL,

Plaintiffs,

-vs-

ALBERT LORENZO, Individually and in his Representative Capacity as President of Macomb Community College; WILLIAM MACQUEEN, Individually and in his Representative Capacity as Vice President for Human Resources of Macomb Community College; GUS J. DEMAS, Individually and in his Representative Capacity as Dean of Arts and Sciences for Macomb Community College; and MARK COUSENS, Individually and in his

Representative Capacity as the	)
Attorney for the Macomb	)
Community College Faculty	)
Organization,	)
Defendants.	)
_____	)

JUDGES:

PAUL D. BORMAN, UNITED STATES DISTRICT COURT JUDGE.

OPINION

ORDER AND OPINION GRANTING PLAINTIFF'S RENEWED MOTION FOR PRELIMINARY INJUNCTION

Before the Court is Plaintiff John C. Bonnell's Emergency Renewed Motion for Preliminary Injunction. The Court heard oral argument on this motion on July 15 and 30, and August 3 and 19, 1999. Upon consideration of the motion, the submissions of the parties, and the applicable law, the Court GRANTS Plaintiff's motion and ORDERS his immediate reinstatement with pay as a Professor of English at Macomb Community College.

I. INTRODUCTION

Although the instant complaint is based in part on discipline received for using allegedly profane classroom language, the Court's resolution of the instant motion, as discussed *infra*, does not reach the issue of First Amendment protection of the specific profane speech used by Plaintiff in his classroom.

The issue presently before this Court is whether, given the instant fact scenario, Plaintiff, who was already been suspended from teaching for seven months, can be suspended for an additional four months based upon the Defendants' determination that he violated the confidentiality of a student complainant, and retaliated against that student who had filed a complaint against him based upon his use of profane language in the classroom. Specifically, the issue is whether Plaintiff's conduct in releasing the student's complaint, after removing the student's name and class, and attaching an eight page memorandum discussing the First Amendment in responding to the complaint, was protected by the First Amendment to the Constitution, or was instead a violation of confidentiality and an act of retaliation against the student.

This Court concludes that Plaintiff's conduct in releasing a redacted copy of the complaint, attached to his response entitled *An Apology: Yes, Virginia, There is a Sanity Clause*, was protected by the First Amendment and was not a breach of confidentiality or retaliation against the student complainant.

II. BACKGROUND

A. Underlying Factual Development

Plaintiff[1] Professor John C. Bonnell filed the instant action alleging, *inter alia*, that disciplinary action imposed against him violates his civil rights. The lawsuit names as defendants in their individual and representative capacities

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[1] Although both Professor John C. Bonnell and his wife Nancy L. Bonnell jointly filed the instant action, the term "Plaintiff" refers to Professor Bonnell.

Albert Lorenzo, President of Macomb Community College (MCC); William MacQueen, Vice President for Human Resources of MCC; Gus J. Demas, Dean of Arts and Sciences for MCC; and Mark Cousens, the attorney for the faculty union, the Macomb Community College Faculty Organization (MCCFO).[2] Neither MCC nor MCCFO are named as defendants.

Bonnell has been a professor of English and literature at MCC since 1967. Bonnell asserts that throughout the decades he has employed "all of the English language" in his teaching style, including words which some may regard as offensive. Until the events giving rise to the instant action, Bonnell has never been disciplined for his use of classroom language.

The genesis of this matter arises from a complaint filed against Bonnell by a student of his in the fall 1998 semester. The student asserted that Bonnell's profane language in the classroom, while not directed at any student, amounted to sexual harassment. Defendants ultimately determined that while colorable, the complaint lacked merit as to the sexual harassment claim. However, MCC suspended Bonnell for three days in February 1999 due to his allegedly profane classroom language. Thereafter, Bonnell responded to the student's complaint by redacting her name and class and distributing it along with his response, *An Apology: Yes, Virginia, There is a Sanity Clause*. MCC reacted to Bonnell's response by suspending him for four months without pay,

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[2] "MCC Defendants" collectively refers to Defendants Lorenzo, MacQueen, and Demas.

primarily for breach of confidentiality and for retaliation against the student complainant.

MCC had established a sexual harassment policy in September 1992 which also enveloped the use of non-germane, profane language in the classroom. The policy stated, *inter alia*, that:

> the [MCC] administration concluded that academic freedom does not protect acts of sexual harassment or the use of profane, vulgar, or obscene language which is unrelated to the course content and educational purpose.

(Sexual Harassment Memorandum, Sept. 15, 1992; MCC Defendants' Response, OMPI,[3] Ex. 1.) It also warned that:

> the College will discipline teachers who sexually harass their students or gratuitously and regularly use profane, vulgar, or obscene language in the classroom.

(*Id.*) The Court notes that the policy and the memorandum deal with two separate issues - first, sexual harassment, and second, the use of non-germane, profane language.

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[3] As the emergency renewed motion for preliminary injunction incorporates the original motion for preliminary injunction, this Order necessarily cites to both sets of briefs and exhibits. Accordingly, the citation "OMPI" refers to the original motion for preliminary injunction, and "RMPI" refers to the renewed motion for preliminary injunction.

The Court recognizes that there is a significant difference, constitutionally, between the First Amendment protections afforded to an individual regarding use of classroom language, and use of language to retaliate against a student. Nevertheless, because Bonnell's classroom language was the basis for the student's complaint, it is important to note that there is no evidence that Bonnell's use of profane language in the classroom was ever directed toward a particular student.

MCC's sexual harassment policy was revised in February 1996 and May 1997. Defendant MacQueen, MCC's Vice President for Human Resources, issued a memorandum on July 30, 1997 which he distributed with the policy and which stated:

> Regular use of profane, vulgar or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline.

(MCC Defendants' Response, OMPI, Ex. 3.)

On January 19, 1998, a parent of a Bonnell student (not the student complainant in this matter) complained to MCC about a handout Bonnell distributed in class. (*See* Letter by Keith Waller, Jan. 19, 1998; MCC Defendants' Response, OMPI, Ex. 4.) The handout, titled *My Semester Overview*, was prepared in 1991 by one of Bonnell's former students and reviewed Bonnell's course. The review is generaly favorable, except for the professor's use of profanity. (*SeeMy Semester Overview*, MCC Defendants' Response, ONPI, Ex. 4.)

Bonnell contends that he distributes this handout to his students at the beginning of each semester in order place them on notice of the type of language he employs in teaching the English course.

Based on the January 19, 1998 complaint from the parent, MacQueen initiated an investigation. MacQueen wrote Bonnell a memo on February 19, 1998 regarding "Obscene and vulgar language in classroom," and scheduled a meeting with Bonnell and his union representative on February 26, 1998. (*See* MCC Defendants' Response, OMPI, Ex. 5.) In a memorandum dated February 23, 1998, Bonnell agreed to the meeting and defended the language he used. (*See* MCC Defendants' Response, OMPI, Ex. 6.)

Bonnell explained that he never directed any vulgar terms toward a particular student, and that he only used the words to demonstrate an academic point. With regard to the terms in *My Semester Overview*, Bonnell contended that he rarely used words like "pussy" or "cunt" as they are so emotionally charged. Bonnell maintained that he employed these terms to demonstrate "the chauvinistic, degrading attitudes in society that depicts women as sexual objects, as compared with certain words used to describe male genitalia which are not taboo or considered to be deliberately intended to degrade." (Plaintiff's Brief, OMPI, at 3.)

The February 1998 investigation concluded with MacQueen issuing Bonnell a warning letter on March 4, 1998. The letter advised Bonnell that:

> Unless germane to a discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your

> utterance in the classroom of such words as 'fuck,' 'cunt,' and 'pussy' may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment.

(Memorandum Regarding Obscene and Vulgar Speech, March 4, 1998; Plaintiff's Brief, OMPI, Ex. C.)

During the 1998 fall semester, a second complaint was filed against Bonnell, which became the catalyst for the action at bar. On November 6, 1996, a female student enrolled in Bonnell's English 122 course telephoned MCC to complain about his classroom language. An, as yet, unidentified MCC employee instructed her to reduce her complaint to writing. She, thereafter, filed a written complaint which, in four places, termed her complaint about language as relating to sexual harassment. MCC, thereafter, treated it as a sexual harassment complaint. The written complaint alleged that, in discussing sexually charged literature, Bonnell used "lude [sic] and obscene comments . . . [which] were dehumanizing, degrading, and sexually explicit." (Sexual Harassment Complaint, Nov. 6, 1998; (Attachment 1) MCC Defendants' Brief, OMPI, Ex. 8.) Based on this charge, Defendant Demas, MCC's Dean of Arts and Sciences, instituted an investigation of Bonnell on November 16, 1998. Demas provided Bonnell a copy of the complaint and informed him that a meeting was scheduled to discuss it, and that he was entitled to have union representation present.

Prior to the next meeting, Bonnell, after redacting both the complaining student's name[4] and the class in which she was enrolled from the sexual harassment complaint, distributed copies of it to the students in all six of his classes and posted it on a bulletin board outside of his class. Bonnell maintains that he did this in order to inspire a class discussion on academic freedom and to solicit student feedback. He indicated that he was under the impression that the complainant had withdrawn from the class, but that if she had been present, he would not have distributed the redacted copies. (*See* Transcript of Motion Hearing, Bonnell Testimony, August 3, 1999 at 68-71.)

Defendant William MacQueen, Defendant Gus Demas, two representatives from the Macomb Community College Faculty Organization (MCCFO), Defendant Mark Cousens, MCC's general counsel, Bonnell, and others, met on December 3, 1998 to discuss the sexual harassment complaint. MacQueen informed Bonnell that the complainant orally relayed her concerns of Bonnell's use of the phrases "blow job" and "butt-fucking" in his class. Bonnell admitted to using the terms, but contends that he explained the context for this use, and that the terms were germane to course content. The MCC Defendants assert that, while Bonnell did indicate that "blow job" was used in reference to the President Clinton/Monica Lewinsky affair, he did not state that the language was germane to his classes or was connected to an attempt to discuss issues of public concern.

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[4] Hereinafter, the terms "complainant" or "complaining student" refer to the student who filed the instant complaint against Bonnell on November 6, 1998.

On December 12, 1998, in response to the instant student complaint and the ongoing investigation by MCC, Bonnell wrote an acerbic satire entitled "*An Apology: Yes, Virginia There is A Sanity Clause*,"[5] (hereinafter the "*Yes, Virginia*" memorandum). Among other topics, the *Yes, Virginia* memorandum responds to the specific issues of Bonnell's classroom language which the complainant relayed to MCC. Bonnell concluded his *Yes, Virginia* memorandum by stating that his use of the terms at issue was protected by the "sanity clause," *i.e.*, the First Amendment. (*See* Plaintiff's Brief, OMPI, Ex. D.) Bonnell attached the *Yes, Virginia* memorandum to a redacted copy of the sexual harassment complaint, and distributed copies of both to more than two hundred MCC faculty members.

A second MCC hearing on the sexual harassment complaint was conducted on December 18, 1998. Prior to the hearing, MCC had determined that there was no legally justifiable basis for the student's sexual harassment complaint against Bonnell. Ms. Margaret MacTavish, MCC's Director of Human Resources Management and Affirmative Action

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[5] Bonnell based his *An Apology: Yes, Virginia, there is a Sanity Clause* memorandum on the famous editorial "*Yes, Virginia, there is a Santa Claus*," first published in the NEW YORK SUN on September 21, 1897. *See A Special Anniversary Issue of the London Free Press*, LONDON (Ontario, Canada) FREE PRESS, Feb. 25, 1999, at E1. Francis P. Chuch wrote the editorial in response to eight year old Virginia O'Hanlon's letter questioning the existence of Santa Claus. Virginia's letter and Church's response are widely known as a number of newspapers have reprinted them each Christmas for over one hundred years. *See, e.g.*, THE BUFFALO NEWS, Dec. 25, 1998, at B2; THE DETROIT NEWS, Dec. 25, 1998, at F5.

Officer, testified that "the decision that was made was to pursue the complaint on the basis of the profane, vulgar, obscene language in the classroom rather than sexual harassment." (MacTavish Dep. at 135; Plaintiff's Memorandum of Law Pursuant to the Court's Directive on July, 16, 19[9]9, Ex. A.) Furthermore, at that hearing, Cousens, in the presence of MCC officials, informed Bonnell that sexual harassment was no longer the issue. Indeed, MacTavish testified that before the officials met with Professor Bonnell, it was determined that the agenda for that December 18 meeting was not sexual harassment, but the use of words. (*Id.* at 136.)

MCC then proceeded, during that hearing, to concentrate on the issue of Bonnell's classroom language. At the hearing, the statements of some of Bonnell's students were taken. Of the five students present, only one student indicated a problem with Bonnell's language.

On January 5, 1999, Demas issued a memorandum, prepared by MacQueen,[6] which suspended Bonnell without pay from February 1-3, 1999. Demas/MacQueen concluded that Bonnell improperly used in his class the terms "shit," "damn," "fuck," "ass," "butt-fucking," "blow job," and "tits on a nun are as useful as balls on a priest." (*See* Plaintiff's Brief, OMPI, Ex. E.) Thus, to summarize the chain of events, MCC at this time had determined that the student complaint was not a valid claim of sexual harassment, and further, had disciplined Bonnell for his classroom language with a three day suspension. In response to his three day suspension,

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[6] In addition to being Vice President of Human Relations for MCC, Defendant MacQueen is also a labor law attorney.

Bonnell drafted a scathing memorandum to Demas, and, like the redacted complaint and the *Yes, Virginia* memorandum, he distributed it to the MCC faculty. (*See* MCC Defendant's Brief, OMPI, Ex. 13.)

On January 8, 1999, MacQueen issued a memorandum to Bonnell stating that Bonnell's distribution of his *Yes, Virginia* memorandum with the sexual harassment complaint may deter students from complaining. Accordingly, MacQueen instructed Bonnell:

> not to post, distribute, or discuss . . . specific complaints filed by one or more of your students against you regarding sex harassment or your use of obscene or vulgar language, or such complaints against you generally, with any person enrolled in one or more of your classes unless permission has been granted by [MCC Provost] Dr. Rose Bellanca upon application of your union or attorney. This prohibition extends to discussion of any disciplinary action which has or may be taken against you.

(Memorandum Regarding Discussion of Student Complaints, Jan. 8, 1999; MCC Defendants' Brief, OMPI, Ex. 14) (emphasis added). MCC describes this memo as a "privacy directive," while Bonnell refers to it as a "gag order." This directive prevented a college English professor from informing his adult students that he was being suspended from teaching for three days. Were the students supposed to assume when he did not appear that Professor Bonnell was "skipping" class, shirking his responsibility as a professor? It was an important part of his responsibility to his adult students to

explain why he would not be teaching his classes. This was a draconian restriction on a professor's ability to properly communicate with his students.

The MCC Defendants contend that Bonnell violated this January 8, 199 directive and conducted a public retaliation campaign. During the latter half of January 1999, Bonnell, *inter alia*, distributed copies of the *Yes, Virginia* memorandum attached to the redacted student complaint to television channels 4 and 50, and to THE MACOMB DAILY newspaper. In addition, Bonnell violated the order by informing his classes that, due to his suspension, he would not be present to teach between February 1-3, 1999. Bonnell did not go into greater detail about his absence.

On January 28, 1999, Bonnell met with MacQueen and others to discuss the circumstances surrounding the distribution of the *Yes, Virginia* memorandum and the redacted complaint.

On February 1, 1999, during the first day of his suspension, nearly all of Bonnell's students were absent from his classes. Instead, they signed attendance sheets indicating that they were supporting Bonnell and protesting his suspension. In addition, some students demonstrated against Bonnell's suspension on the MCC campus.

On February 2, 1999 MacQueen placed Bonnell on an indefinite suspension, with pay and benefits, pending an investigation.[7] That suspension, which lasted until July 9,

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[7] On July 9, 1999 MCC Provost Rose Bellanca, *inter alia*, suspended Bonnell for four months without pay, from August to late December 1999. This is discussed, *infra*.

1999, prevented Bonnell from teaching in the spring and summer terms.

MacQueen based the indefinite February suspension on (1) abnormally low attendance for the substitute teacher in Bonnell's classes; (2) the substitute teacher overheard a student stating that Bonnell told them they did not have to attend class, (3) MCC's discovery that Bonnell would allegedly mark down the grades of students who did attend class during his three day suspension; (4) disruptive protests by seven to nine of Bonnell's students; (5) Bonnell's alleged delivery of the confidential sexual harassment complaint to the news media in violation of both MacQueen's earlier directive and federal law;[8] (6) Bonnell's alleged wasting of class time in order to prepare for a television news interview; and (7) Bonnell's discussion of his suspension with the media. MacQueen informed Bonnell that:

> Because each of the foregoing matters is or may be causally related to disruption of the educational process (or even physical confrontation) in your classes or in other classes at Macomb, and requires investigation by the College which may lead to further disciplinary action, you are hereby suspended from your duties as a teacher with pay and benefits, effective February 4, 1999. This

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[8] The MCC Defendants informed Bonnell that his delivery of the student's complaint to the news media violates, *inter alia*, the Family Educational Rights and Privacy Act (FERPA), *20 U.S.C. § 1232g*. (*See* Memorandum Regarding Suspension, Feb. 2, 1999; Plaintiff's Brief, OMPI, Ex. F.)

> suspension will continue until you are notified by me in writing that you may resume your duties. During this suspension, you are hereby directed not to enter any campus of Macomb Community College except for the limited purpose of meeting with MCCFO leaders or College officials relative to disciplinary action which has been or may be taken against you. You are also hereby directed not to discuss this suspension or any disciplinary action (verbally or in writing; directly or through a person acting in your direction) with any person enrolled as a student at Macomb or any person intent on disrupting the educational process at Macomb, unless written permission is granted by Dr. Rose Bellanca for good cause upon application of your union or attorney.

(Memorandum Regarding Suspension, Feb. 2, 1999; Plaintiff's Brief, OMPI, Ex. F) (emphasis added). The Court notes the draconian nature of this suspension: (1) Bonnell could not enter any MCC campus except to meet with college or union officials; (2) Bonnell was also significantly restricted with regard to whom he could discuss his suspension.

MacQueen's speech restrictions on Bonnell were a prior restraint, since Bonnell must request permission before being allowed to speak to his students (or the media). *See Lovell v. Griffin,* 303 U.S. 444, 451-52, 82 L. Ed. 949, 58 S. Ct. 666 (1938). Because prior restraints severely impact First Amendment rights,

> "'any system of prior restraints of expression comes to [the court] bearing a heavy presumption against its constitutional validity.'

> *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963); *see also Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). The Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.' *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971)." *New York Times Co. v. United States,* 403 U.S. 713, 91 S. Ct. 2140, 2141, 29 L. Ed. 2d 822 (1971) (Pentagon Papers) (per curiam).

Moore v. Kilgore, 877 F.2d 364, 387 (5th Cir. 1989) (dissenting opinion). The MCC Defendants have not demonstrated a compelling interest in restricting Bonnell's speech nor that the prior restraint is the least drastic means of doing so.

Bonnell asserts that, through the collective bargaining process, he has sought protection from MCCFO's attorney, Defendant Mark Cousens, as early as March 1998. Bonnell contends that Cousens indicated that neither he nor the union supported Bonnell's interest. As a result, Bonnell retained private counsel. Bonnell sought to have his new counsel represent him at the next stage of disciplinary hearings set for March 1999.[9]

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[9] Bonnell's next disciplinary hearing was originally scheduled for March 11, 1999. However, along with the instant complaint, Bonnell filed a motion for preliminary injunction or temporary restraining order on March 10, 1999. Accordingly, the MCC Defendants adjourned that hearing upon learning through Bonnell's new counsel that he would not attend this meeting.

Based on the disciplinary action taken against him as of March 1999, and the continuing speech restrictions the MCC Defendants had placed on him, Bonnell filed the instant complaint on March 10, 1999. Bonnell and his wife allege six counts in their Complaint: (I) Conspiracy to Violate Civil Rights of Professor Bonnell, 42 U.S.C. § § 1983, 1985; (II) Constitutional Substantive Violations; (III) Gross Negligence, 42 U.S.C. § § 1983, 1985, 1988; (IV) Declaratory Judgment; (V) Negligence/Duty of Fair Representation under Michigan law; and (VI) Loss of Consortium.[10]

B. Subsequent Factual Development andProcedural Posture

On March 10, 1999, along with his Complaint, Bonnell filed a motion for preliminary injunction or in the alternative for temporary restraining order. On May 6, 1999, the Court heard oral argument on this motion. Ruling from the bench, the Court denied the motion for that time, to permit the parties to proceed with a hearing at MCC because,

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[10] On April 26, 1999 Plaintiffs filed a motion to file a First Amended Complaint. The amended complaint contains adds one count: (VII) Pendent State Law Claim: Breach of Contract Against Defendant Board of Trustees of the Community College District of the County of Macomb.

in an unprecedented action, rather than requiring that Bonnell be represented by union counsel at the hearing, Defendants Lorenzo, MacQueen, and Demas, and the MCCFO agreed to permit Bonnell to be represented by his own counsel at the hearing.[11]

The disciplinary hearing was held on May 25, 1999 at MCC. In attendance were Professor and Mrs. Bonnell and their counsel; Defendant MacQueen and his counsel; Defendant Cousens representing the MCCFO; William Romano, Assistant Grievance Coordinator for MCCFO; Marie Baeckeroot, Grievance Coordinator for MCCFO; Margaret MacTavish, Director of Human Resources of MCC; and Dr. Rose Bellanca, Provost of MCC. (*See* Transcript of Bonnell Grievance Hearing, May 25, 1999; Plaintiff's Brief, RMPI, Ex. A.) The hearing consisted of Bonnell being questioned on several issues by his attorneys and MacQueen. Bonnell denied encouraging his students to be absent on February 1, 1999 while he served his three day suspension. (*See id.* at 5-6.) Although admitted that he discussed his suspension after students questioned him, he denied that he

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[11] Aside from the action taken by MCC, Jim Yizze, president of the MCCFO, issued a memorandum to all Union members on May 10, 1999. In addition to providing a summary of Bonnell's case to date, the Yizze memorandum stated the Union is not required to support all grievances, but instead is only obligated to objectively consider the merits of each case presented to the Faculty Senate. Yizze concluded that Bonnell does not have the right to replace MCCFO representatives unilaterally, but he does have the right to waive MCCFO representation and pursue his cause through alternative means. (*See* Memorandum Regarding John Bonnell Suspension - Update, May 10, 1999; Plaintiff's Brief, RMPI, Ex. D.)

commented on the specific details of the sexual harassment complaint against him, other than to explain that a student complained about his language. (*See id.* at 6-7.) Bonnell admitted that he provided the television and print media a packet containing a redacted copy of the complaint, which omitted identifying characteristics of the student, and a copy of his satirical *Yes, Virginia* memorandum. (*See id.* at 7-9.) While he denied that he distributed copies of these material to his current students, he admitted that he gave a packet to a former student who later enrolled in the literature class he was teaching. (*See id.* at 7-10.)

During the May 25, 1999 hearing, Bonnell maintained that he believed that his teaching methods complied with MCC's July 30, 1997 memorandum prohibiting regular use of profane, vulgar, or obscene language not germane to course content. (*See id.* at 12-13.) In addition, he submitted as evidence roughly twenty-five unsolicited letters of support from his students. These letters detail Bonnell's teaching methods, the events occurring during the week of his three day suspension, and why the students did not attend class. (*See* Plaintiff's Brief, RMPI, Ex. B.) Specifically, one letter from Sherry Davis explains that she voluntarily organized the boycott of Bonnell's class in protest of his suspension. (*See id.*)

Finally, Bonnell detailed the attendance policy for his classes. Bonnell explained that he gives no credit for attendance when students attend a class. If they attend while he is absent, or if they attend a class preceding or following a class for which he announced that he would be absent, Bonnell gives his students a modicum, 1/64th, of credit. Put another way, Bonnell compensates students who attend class when he does not. Bonnell stated that this policy may have led

to confusion during his suspension. (*See* May 25, 1999 Transcript at 23-25, Plaintiff's Brief, RMPI, Ex. A.)

On June 7, 1999, MacQueen sent Bonnell a memorandum stating that, based on the January 28 and May 25, 1999 investigative hearings, "there is reasonable cause to believe that [Bonnell] violated Federal and Michigan law." (Memorandum Regarding Notice of Charges, June 7, 1999; Plaintiff's Brief, RMPI, Ex. C.) In this memo, MacQueen formally notified Bonnell of four charges that MCC was initiating against him: (1) Insubordination by distributing copies of the student's sexual harassment complaint and by discussing his discipline with students, both in violation of MacQueen's January 8, 1999 directive; (2) Breach of Confidentiality by distributing copies of the student's complaint and the satirical *Yes, Virginia* memorandum to the faculty, media, and a former student in violation of both the collective bargaining agreement between MCC and MCCFO and the Federal Family Educational and Privacy Rights Act (FERPA); (3) Retaliation against the complainant student by distributing the student's complaint in violation of MCC's policy prohibiting sexual harassment, federal Title IX, and the Michigan Elliott-Larsen Civil Rights Act (ELCRA); and (4) Disruption of the Educational Process by materially contributing to the absences of nearly all of his students in his classes and distributing the student's complaint. The memo concluded:

> Since a finding that you committed any of the violations alleged above (including disruption of the educational process) may lead to the imposition of discipline, you are entitled to a hearing before Dr. Rose Bellanca at which you, your attorneys, and/or MCCFO may present evidence or argument in opposition to

> a conclusion, that you committed them or that disciplinary action should be taken. Please have your attorneys or MCCFO representatives inform [MCC's attorney] by June 18, 1999 whether you wish a hearing. If a hearing is not requested, Dr. Bellanca will proceed to a determination of these charges.

(*Id.* at 4.) On June 22, 1999 Plaintiff declined a hearing before Dr. Bellanca.

On July 9, 1999, MCC Provost Dr. Rose Bellanca issued a "Disciplinary Suspension Memorandum" to Professor Bonnell. Although the memorandum of findings was drafted by MacQueen,[12] it was based on Dr. Bellanca's own conclusions regarding each of MacQueen's four charges.

Dr. Bellanca first determined that Bonnell disrupted the educational process when he informed his students about his suspension, the "gag order," that their attendance during this period was their choice, that they would receive credit for signing an "attendance sheet," and when Bonnell distributed the sexual harassment complaint to the media. As a penalty for "Disruption of the Educational Process," Dr. Bellanca imposed a formal reprimand. The Court concludes that the January 8, 1999 MacQueen directive prohibiting Bonnell from discussing his suspension with his students amounted to a gag order. Indeed, that "gag order," amounted to a disruption of the educational process.

With respect to the charge of "Insubordination," Dr. Bellanca concluded that Bonnell should be disciplined for

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[12] *See supra*, n. 6.

violating MacQueen's January 8, 1999 memo, and for distributing the student's complaint to the media. As to this charge, Dr. Bellanca imposed an unpaid two week suspension. "Insubordination" is a strange term to use against an English professor under a continuing contract. The MCC Defendants use of the term "insubordination" against Professor Bonnell ties in with the Defendants' argument that "All he has is a right to industrial due process, as it were, industrial relations due process. . . ." (Motion hearing, July 30, 1999, Transcript at 37.) The Court recognizes that colleges are a resource for ideas, free thought, experimentation, and critical thinking. The position of a college English professor includes with it First Amendment protections that may not be present in the military service[13] or in an industrial job. The teaching of college English requires the communication of thoughts and ideas by reading and writing, and the use of the entire English language. When

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[13] The U.S. Court of Appeal for the Third Circuit noted in *Trotman v. Bd. of Trustees of Lincoln University*, 635 F.2d 216, 230 (3d Cir. 1980):

> It is particularly important that in cases dealing with academia, the standard applied in evaluating the employer's justification should be the one applicable to the rights of teachers and students "in light of the special characteristics of the school environment," and not that applicable to military personnel who must meet the "overriding demands of discipline and duty."

(quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 21 L. Ed. 2d 731, 89 S. Ct. 733 (1969); Parker v. Levy, 417 U.S. 733, 744, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974)).

a college gags the professor or censors the students, the free expression of ideas and thoughts as supported by the First Amendment is impinged upon. There is no valid justification in support MCC's suspension of Bonnell for insubordination for 14 days without pay, from August 18, 1999 to August 31, 1999.

Finally, Dr. Bellanca concluded that Bonnell was responsible for breach of confidentiality and retaliation for distributing redacted copies of the sexual harassment complaint and his *Yes, Virginia* response. As to this charge, she imposed an unpaid four month suspension from August to September 1999 that would continue throughout the Fall 1999 semester.[14] This suspension will be fully discussed, *infra*.

Currently before the Court is Plaintiff's Renewed Motion for Preliminary Injunction. Plaintiff seeks an order reinstating him with pay as a Professor of English at MCC, pending a full hearing on the merits of his claim in this court.

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[14] Bonnell has requested his union, MCCFO, to file a grievance on his behalf concerning these disciplinary sanctions. On two recent prior occasions, the MCCFO Faculty Senate, by wide margins, voted not to proceed with grievances requested by Bonnell. If the MCCFO votes to file the grievance, Bonnell will be suspended from teaching with pay while the matter is being resolved. If MCCFO refuses to support the grievance, then Bonnell will receive no pay. Further, even if MCCFO supports the grievance, if Bonnell loses the grievance decision, he will be suspended without pay for four months. During the grievance process, Bonnell will be suspended from teaching for the four months of August to December, 1999, pursuant to the Bellanca memorandum of July 9, 1999.

III. EXHAUSTION OF REMEDIES

Appendix D of the Agreement between the Board of Trustees of the Community College District of the County of Macomb and the MCCFO (the Agreement) establishes a three step grievance procedure for MCC teachers and the MCCFO to pursue in the event of a dispute over the Agreement. (*See* Plaintiffs' Complaint, Ex. A.) Accordingly, the MCC Defendants argue that the case before the Court is actually an untimely labor dispute as opposed to an action for First Amendment violations. The MCC Defendants contend that Bonnell is suspended pursuant to the Bellanca Memorandum. The MCC Defendants also maintain that the collective bargaining agreement requires Bonnell to resolve this dispute through the grievance/arbitration procedures prior to taking the matter to court, and, therefore, the court should dismiss the case for being untimely. Bonnell contends that the suspension was based on his exercise of his First Amendment rights relating to free speech.

Generally, an employee may not pursue a civil action against his employer for breach of a collective bargaining agreement unless he has exhausted the grievance procedures set forth in the contract. *See Rogers v. Board of Education of the Buena Vista Schools,* 2 F.3d 163, 166 (6th Cir. 1993); *Sankar v. Detroit Board of Education*, 160 Mich. App. 470, 474, 409 N.W.2d 213 (1986). Courts have, however, granted exceptions to this rule in situations such as where a plaintiff seeks remedies not provided under the collective bargaining agreement, or where a plaintiff's efforts to exhaust contractual remedies would be futile. *See Sankar, id.*

In the spirit of the first exception, an employee is not always required to exhaust remedies provided in a collective bargaining agreement when the employee challenges

violations of rights independent of the contract, such as statutory claims. *See, e.g., Wright v. Universal Maritime Service*, 525 U.S. 70, 119 S. Ct. 391, 396-97, 142 L. Ed. 2d 361 (1998) (absent a clear and unmistakable waiver of the right to sue, longshoremen did not have to exhaust arbitration clause of collective bargaining agreement before filing claim under Americans with Disabilities Act). The same exception would apply in the case of challenging violation of constitutional rights.

Bonnell has alleged that, in violation of 42 U.S.C. § 1983, Defendants infringed upon his First Amendment rights. The Supreme Court has held that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 516, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982). In the context of § 1983 actions filed by teachers for First Amendment violations, courts have relied on *Patsy* to hold that professors do not need to exhaust either state administrative remedies or remedies provided by collective bargaining agreements prior to their cases being heard in federal courts. For example, in *Narumanchi v. Board of Trustees of the Connecticut State University*, 850 F.2d 70 (2d Cir. 1988), a university professor filed suit after he was suspended without pay for two weeks, allegedly based on his race and vocal opposition to various university policies. The district court dismissed his First Amendment claims after the professor refused to avail himself of the grievance procedures in the collective bargaining agreement. In reversing the district court, the Second Circuit held that:

> [First Amendment rights] may not be infringed regardless of the procedural "protection"

> accompanying the deprivation. . . .[It is not] permissible, in light of *Patsy v. Board of Regents, supra,* to require initial recourse to available state proceedings, including union grievance proceedings, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983. *See Clark v. Yosemite Community College District,* 785 F.2d 781, 790 (9th Cir. 1986); *Hochman v. Board Education,* 534 F.2d 1094 (3d Cir. 1976).

Narumanchi, 850 F.2d at 73 (emphasis added). *See also Mellody v. Upper Merion Area School District,* 1998 U.S. Dist. LEXIS 838, No. CIV. A. 97-5408, 1998 WL 54383, (E.D. Pa. Jan. 30, 1998); *Mahoney v. Hankin,* 593 F. Supp. 1171, 1173-74 (S.D.N.Y. 1984). Accordingly, Bonnell is not required to exhaust his administrative remedies prior to filing his § 1983 action.

IV. PRELIMINARY INJUNCTION

Bonnell moves for a preliminary injunction to require the MCC Defendants to reinstate him to his position as an English professor at MCC. In the original motion for preliminary injunction, Bonnell requested an order permitting his private counsel to represent him during any disciplinary proceeding. In light of the Court's May 6, 1999 ruling, this issue is now moot.

In evaluating a motion for preliminary injunction, the Court considers four factors: (1) the likelihood that the party seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will

suffer irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction. *See Amelkin v. McClure,* 168 F.3d 893, 902 (6th Cir. 1999) (quotation marks and citation omitted). The Court will examine these factors in a slightly modified sequence.

A. Irreparable Harm

From the events giving rise to the instant action, MCC has issued Bonnell a number of disciplines and/or restrictions. Prior to Dr. Bellanca's suspension memorandum of July 9, 1999, Bonnell had received a three day suspension from February 1-3, 1999 for use of non-germane, profane classroom language; a privacy directive; and then on February 2, 1999 an indefinite suspension for "investigation" which concluded on July 9, 1999.

In July 1999, after reviewing the "charges" issued against Bonnell in June 1999, Dr. Bellanca imposed three sanctions: a formal reprimand, an unpaid two week suspension from mid-August to late August 1999, and an unpaid four month suspension during the fall 1999 semester from mid-August to mid-December, 1999. Of these disciplinary actions, a portion of the two week suspension, and the unpaid four month suspension have yet to be served.

The MCC Defendants contend that while Plaintiff may have a MCCFO contractual right to receive his salary during the resolution of his grievance, he does not have a constitutional right to work. Consequently, they maintain, Plaintiff has not demonstrated the requisite irreparable harm

necessary for a preliminary injunction if MCCFO votes to proceed with his grievance.

Two principal issues are before the Court:

> **I. Was Plaintiff was suspended for exercising his First Amendment rights when he distributed to faculty, students, and the media copies of his *Yes, Virginia* memorandum and a redacted version of the student's sexual harassment complaint?**
>
> **II. Assuming, arguendo, that Plaintiff was suspended for exercising First Amendment rights, does he have a constitutional right to teach while he attempts to grieve his suspension through the contractual arbitration process?**

Since a determination that Plaintiff has not suffered irreparable injury would preclude further analysis of his motion for preliminary injunction, the Court will examine the irreparable harm issue first, *i.e.*, the second of the above listed issues.

Sixth Circuit authority is clear that a nontenured teacher does not have a constitutional right to teach a particular class. *See Parate v. Isibor,* 868 F.2d 821, 832 (6th Cir. 1989) (citing *Sullivan v. Brown,* 544 F.2d 279 (6th Cir. 1976)). In *Parate*, a nontenured engineering professor filed a section 1983 action and moved for a preliminary injunction to reinstate him after university officials terminated him at the end of his contract. Parate asserted separate claims under both the First Amendment and the Fourteenth Amendment.

Without regard to the First Amendment claim and solely related to Plaintiff's "Fourteenth Amendment claim that the [university officials] arbitrarily and unreasonably interfered with his due process liberty interest in the free and full pursuit of his profession as a . . . professor," the court held that Parate had no Fourteenth Amendment right to teach at that university nor a constitutional right to teach a specific class. 868 F.2d at 831-32. In the instant case, however, Bonnell is a professor under continuing contract at MCC and indeed has been teaching there for 32 years. Thus, he has a right to continued employment at MCC.

While a professor has no liberty interest to teach a specific class or teach at a particular university, a professor *does* have a constitutional right to teach in an environment free from First Amendment violations. In *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977), an untenured school teacher was not rehired after, *inter alia*, he called a local radio station to publically criticize the administration for a new dress code for teachers, and after he used obscene gestures toward students in the cafeteria. In examining Doyle's claim that he was not

rehired due to his First Amendment activities[15], the Court held that:

> Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and he had no constitutional right to a hearing prior to the decision not to rehire him, he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms.

Mt. Healthy, 429 U.S. at 283-84 (emphasis added).

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[15] In *Mt. Healthy*, the district court found that the telephone call was "clearly protected by the First Amendment" and that because it played a "substantial part" in the district's decision not to rehire Doyle.. The Sixth Circuit affirmed, and the Supreme Court vacated and remanded. The Supreme Court held that the district court used the wrong test to analyze Doyle's claims. The Court explained that after he satisfied his burden of showing that his conduct was constitutionally protected and was a motivating factor in the board of education's decision not to rehire him, the district court should have gone on to determine whether the board of education had shown by a preponderance of the evidence that it would have reached the same decision even in absence of the protected conduct. The Supreme Court accepted the district court's determination that the phone call was constitutionally protected in part because there was no suggestion by the Board that Doyle violated any established policy. *See Mt. Healthy, 429 U.S. at 284.* In the instant case, MCC had a policy of confidentiality with regard to sexual harassment complaints.

Although Bonnell does not have a liberty interest in his teaching position, if he was suspended for First Amendment activities then he has established irreparable harm. This conclusion is also supported by *Newsom v. Norris*, 888 F.2d 371 (6th Cir. 1989).

In *Newsom*, prison inmate advisors sought a preliminary injunction to be reinstated after they were not reappointed, allegedly in retaliation for criticizing the performance of the Chairman of the Disciplinary Board. The inmate advisors claimed, *inter alia*, that the failure of the warden to reappoint them to their positions violated their First Amendment rights. Like *Parate*, the Sixth Circuit determined that the inmate advisors did not have any liberty interests in their positions. However, the Sixth Circuit held:

> Although the appellees did not demonstrate a cognizable property interest in their position as inmate advisors, they did however have a cognizable liberty interest in remaining in their respective positions free from impermissible interference. It is well recognized that it is constitutionally impermissible to terminate even a unilateral expectation of a property interest in a manner which violates rights of expression protected by the First Amendment.

Newsom, 888 F.2d at 375 (emphasis added) (citing, *inter alia*, *Mt. Healthy*, 429 U.S. at 283-84).

The Sixth Circuit further supported its decision with Supreme Court authority relating to the situation at bar, i.e. rights of teachers to teach:

> Existing [Supreme Court] case precedent indicates that a failure to reappoint an individual to a position is equally impermissible, even where there was no cognizable expectation of continued service, if reappointment was denied because of the individual's exercise of First Amendment rights.

Thus, the respondent's lack of a contractual or tenure "right" to reemployment for the 1969-70 academic year is immaterial to his free speech claim. Indeed, twice before, this Court has specifically held that the nonrenewal of a non-tenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. *Shelton v. Tucker*[, 364 U.S. 479, 5 L. Ed. 2d 231, 81 S. Ct. 247 (1960); *Keyishian v. Board of Regents,* [385 U.S. 589, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967)]. We reaffirm those holdings here.

Newsom, 888 F.2d at 376 (emphasis added) (quoting *Branti v. Finkel,* 445 U.S. 507, 515, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980)) (also citing, *inter alia, Mt. Healthy*).

Also based on Supreme Court authority, the Newsom court determined that even minor infringements of First Amendment rights constitute the irreparable harm necessary for injunctive relief as "'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Newsom,* 888 F.2d at

378(quoting *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976) (plurality opinion of Brennan, J.)).

Therefore, in the case at bar, Bonnell will suffer irreparable injury if he was suspended for engaging in protected First Amendment activities.

B. Likelihood of Success on the Merits

Bonnell filed a 42 U.S.C. § 1983 action against the defendants.[16] The elements for a § 1983 claim are: "'1) [Plaintiff] was deprived of a right secured by the federal Constitution or laws of the United States; 2) the deprivation was caused by a person acting under color of state law; and 3) the deprivation occurred without due process of the law.'" *Chatman v. Slagle*, 107 F.3d 380, 384 (6th Cir. 1997) (quoting *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir.1994)) (alterations supplied).

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[16] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In the case at bar, the MCC Defendants are employed by a state institution and are acting under state law. *See, e.g., Silva v. University of New Hampshire,* 888 F. Supp. 293, 312 (D.N.H. 1994).[17]

Bonnell's current four month suspension is ostensibly based on *inter alia*, distributing his *Yes, Virginia* memorandum with the redacted sexual harassment complaint to the MCC faculty, other students, and the public at large. MCC contends that these actions breached the confidentiality for the complainant provided in Section I.A. and Section II of MCC's Policy Prohibiting Sexual Harassment; Article VIII.A.7 of the Master Agreement between MCC and the MCCFO; the Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. § 1232g; Title IX of the Educational Amendments to the Civil Rights Act of 1964, 20 U.S.C. § 1681 et seq.; and the Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2101, *et seq.* MCC also asserts that Bonnell's actions could be regarded as retaliation against the complainant as set forth in the Bellanca memorandum:

> The distribution of your memorandum titled *An Apology: Yes, Virginia, There is a Sanity Clause* was designed to discredit [the complainant] as an immature young woman in need of enlightenment, and thus was designed to destroy her credibility as a complainant. Most significantly, your memorandum is

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[17] Although not relevant to the motion at bar, Bonnell alleges in his Complaint that Defendant Cousens' conduct is also under "state law" since he allegedly conspired with the MCC Defendants. *See Dennis v. Sparks,* 449 U.S. 24, 66 L. Ed. 2d 185, 101 S. Ct. 183 (1980).

> thoroughly demeaning and insulting to [the complainant] as a person in both its content and its tone. It is the very antithesis of how a teacher should treat a student and how a complainant would expect to be treated given the assurances of the law and College policy.

(July 9, 1999 Memorandum from Dr. Rose Bellanca to John Bonnell, regarding Disciplinary Suspension, at 6.)

Professor Bonnell asserts that the First Amendment protects the distribution of the *Yes, Virginia* memorandum, as it relates to academic free speech. In addition, Bonnell maintains that his current suspension is a pretext: that MCC is disciplining him for his classroom language. Essentially, Plaintiff contends that not only was his classroom language the basis for his three day suspension, but that MCC's "privacy directive"/"gag order" was a continuation of MCC discipline, and finally, that the suspension for breach of confidentiality/retaliation was further discipline for his challenging MCC's actions regarding his exercise of his First Amendment rights. The issue at bar has developed into whether the First Amendment protects Plaintiff's distribution of the redacted sexual harassment complaint and the *Yes, Virginia* memorandum.

The Supreme Court has held that government employees, including public teachers, retain First Amendment rights to comment on matters of public concern without fear of retribution by the government as their employer. *See Connick v. Myers*, 461 U.S. 138, 140, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1185 (6th Cir. 1995). In *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). The Court developed a balancing test which

weighed "the interests of the [public employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In *Pickering*, the Supreme Court was confronted with a situation where the school district dismissed a high school teacher "for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools." *Pickering*, 391 U.S. at 564. The Supreme Court held that the issue of school funding was a matter of legitimate public concern, and that free open debate on that subject matter was vital to informed decision making by the electorate. In the instant case, Plaintiff contends that free speech in a classroom, and responding to persons challenging free speech in a classroom, is a matter of legitimate public concern. Furthermore, in *Pickering* the Supreme Court stated:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 572. In the instant case, Plaintiff contends that he, as an English teacher, is a person most likely to speak out and have an informed and definite opinion with regard to germane speech in the classroom, and that accordingly, it is essential

that he be able to speak out on an issue without a retaliatory dismissal. The Court agrees.

Further, Plaintiff contends that since MCC had concluded that the student's complaint, which discussed Plaintiff's classroom language and sexual harassment, clearly did not raise an issue of sexual harassment, the remaining aspect of the complaint was language in the classroom. Thus, Plaintiff contends that his *Yes, Virginia* memorandum dealing the "Sanity Clause," clearly dealt with the First Amendment classroom speech issue. Plaintiff further contends that he used the redacted student complaint, which had caused his February 1-3, 1999 suspension, as a context for him to respond both to her challenge to his classroom language, and MCC's gag order that sought to prevent him from discussing these First Amendment issues, even with his college students.

The Supreme Court in *Pickering* concluded:

> the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

Id. at 573. In the instant case, MCC cannot limit Plaintiff's opportunity to contribute to the public debate on what is germane language in the classroom of a professor of the English language.

The Supreme Court in *Pickering* emphasized the "public interest in having free and unhindered debate on matters of public importance--the core value of the Free Speech Clause of the First Amendment." *Id.* at 573. The Supreme Court held that:

> a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.

Id. at 574. In the instant case, MCC cannot suspend Bonnell from teaching because of his speaking out on First Amendment issues. Plaintiff has spoken on an issue of public importance that deserves the court's protection.

The Court recognizes an issue raised in *Pickering*, and discussed by the Supreme Court thereafter in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), that must be discussed. In *Pickering*, the Supreme Court noted that under those facts, the fact of plaintiff's employment was only tangentially and insubstantially involved in the subject matter of his public communication, so as to regard the teacher as a member of the general public. In the instant case, the MCC Defendants contend that under *Connick v. Meyers*, Plaintiff is directly involved through his employment position with the issue at bar, and thus is not protected under the First Amendment.

In *Connick*, the Supreme Court noted:

> For at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.

Connick, 461 U.S. at 142. The Supreme Court held in Connick:

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Id. at 147.

In *Connick*, the Supreme Court incorporated the *Pickering* balancing test into a two step analysis for determining whether discipline against a public employee violates the First Amendment. The primary concern is whether the speech at issue may be "fairly characterized as constituting speech on a matter of public concern." *Connick*, 461 U.S. at 146; *see also Dambrot*, 55 F.3d at 1186. If the speech relates to a matter of public concern, the court moves to the second step of the analysis and applies the *Pickering* balance test; "if the employee's free speech interests outweigh the efficiency interests of the government as employer, the employee's First Amendment rights have been violated." *Dambrot, id.*

1. Public Concern

The issue of whether speech relates to public concern is a question of law. *See Dambrot, id.* In *Connick*, the Supreme Court explained that "public concern relate[es] to any matter of political social, or other concern to the

community." *Connick*, 461 U.S. at 146.[18] The Seventh Circuit has elaborated that by "public concern," the *Connick* Court "did not mean matters of transcendent importance, such as the origins of the universe or the merits of constitutional monarchy; they meant matters in which the public might be interested, as distinct from wholly personal grievances . . .and casual chit-chat." *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (citations omitted) (emphasis added). *Connick* instructs that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48.

In the case at bar the issue is whether, based on the content, form, and context of the *Yes, Virginia* memorandum and redacted sexual harassment complaint, Bonnell's speech related to a matter of public concern.

The content and form of Bonnell's speech specifically relate both to the sexual harassment complaint and to the First Amendment free speech clause. Further, it is important to note that the sexual harassment complaint had already been resolved in Bonnell's favor at the time of his *Yes, Virginia* memorandum. This supports the conclusion that he *Yes, Virginia* memorandum was what its title and conclusion

---

[18] In *Connick*, a former assistant district attorney asserted that her First Amendment rights were violated when she was allegedly terminated for circulating a questionnaire relating to her superior's decision to transfer her to a different section of criminal court. The Supreme Court held that although one of the questions, relating to whether employees felt pressure to work in political campaigns, was a matter of public concern, that the interests of her employer in effectively and efficiently fulfilling his public duties outweighed any harm to the Plaintiff.

asserted it to be -- a discussion of First Amendment issues, in the context of classroom language.

Professor Bonnell testified that he distributed the complaint in class in order to inspire a debate on academic freedom under the First Amendment, that he distributed the complaint and the *Yes, Virginia* memorandum in order to specifically give context to the discussion:

> Q. Sir, you indicated that you wanted to discuss the concepts of academic freedom and First Amendment by distributing [the redacted complaint]?
>
> A. Yes.
>
> Q. You could discuss in your class academic freedom and [sic] context of First Amendment without any complaints being filed against you?
>
> A. Probably could have.
>
> Q. You could have had a similar discussion without distributing [the sexual harassment] complaint?
>
> A. I couldn't have that discussion. I needed that document to give it the specific context to the discussion.
>
> Q. The context of the discussion was her particular complaint against you for language and sexual harassment. That was the context of

the discussion with your students. That's what you just said?

A. No. What I'm saying, the thing that triggered the First Amendment concern happened to be couched in that letter. It came in the form of that letter.

Q. But to have that discussion with your class, you didn't need to distribute her specific complaints?

A. That's true.

Q. In terms of actual distribution and discussion with the students the context was the complaint that she filed against you, is that correct?

A. That was triggered, yes.

Q. Wasn't that the context of it? That's what brought the issue to context?

A. That is not the only the [sic] thing that we talked about. The academic field is broader than that complaints [sic].

Q. It may be, but you specifically discussed her complaint, correct?

A. It was specifically used as a trigger for discussion in --

Q. Sir, did you discuss her complaint?

A. Not in particular detail.

Q. Why did you distribute it to the students?

A. Because it was a document. True, they didn't need to know, but it was [sic] document that was pertinent.

Q. And it was pertinent that she made a complaint against you?

A. It was pertinent because it existed, and thee was a complaint against me evidently because of that document.

Q. That's what made it relevant because she filed a complaint against you?

A. Yes.

Q. With respect to the Yes, Virginia document, you testified that your distribution of Yes, Virginia, together with a copy of the [sexual harassment] complaint, you also distributed, correct?

A. That's right.

Q. And again, you said that you distributed that with respect to general issues of academic freedom and freedom of speech?

A. Yes.

Q. You could have that discussion, that academic discussion concerning First Amendment and academic freedom, with your faculty cohorts without using that document, correct?

A. Probably so, yes.

Q. That document gave it contexts [sic] to you that this was dealing with a specific complaint by a specific student against your conduct, correct?

A. And with the addition that the college was acting on it, so that if a similar complaint came against any teacher at any time, the person could respond.

Q. That was not the question. You discussed or attempted in your own words to discuss those concepts with your faculty fellows by distributing the student complaint and the Yes, Virginia letter.

A. Yes.

(Transcript of Motion Hearing, Bonnell Testimony, August 3, 1999 at 68-71.)

While Bonnell acknowledged that he could have had a discussion of academic freedom without distributing the redacted complaint to his classes, it was the context of the complaint that made his discussion significant and relevant, not only in class, but also with the faculty and the media.

In *Cliff v. Bd. of School Commissioners of the City of Indianapolis*, 42 F.3d 403 (7th Cir. 1994), the plaintiff was a public school teacher who alleged that school board violated her First Amendment rights by not renewing her contract after she complained about her large class size and problems with student discipline. The court held that although her complaints addressed a subject of general interest to the public, her First Amendment claim failed as a matterof law since her expression was directed only to the personal impact of those issues on her. *See id.* at 409. The Seventh Circuit explained the analysis to determine whether these complaints were a matter of public concern:

> *Connick* requires that we consider "the content, form, and context" of Cliff's statements as revealed by the record as a whole (461 U.S. at 147-48, 103 S. Ct. at 1690-91), and our cases indicate that of these three, content is the most important. The motive which underlies an employee's statements is a relevant but not necessarily dispositive factor. A number of our cases thus direct attention to "'the point of the speech in question; was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?'" Yet we also have indicated that motive cannot rise to the level of an absolute litmus test because it does not supplant content in terms of overall importance to the public concern inquiry. Thus, the fact that an employee speaks at least in part for personal reasons will not automatically de rive her statements of the

> protections afforded to speech on a matter of public concern. Instead, the speaker's personal motive is considered along with the other *Connick* factors.

Cliff, 42 F.3d at 409-10 (citations omitted) (emphasis added). This rationale was adopted by the Sixth Circuit. *See Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 576 (6th Cir. 1997). Thus the issue here is whether Bonnell's discussion/distribution relating to the personal complaint amounted to speech on a matter of public concern.

In *Cliff*, the plaintiff argued that her statements about class size and disciplinary problems were matters of public concern. However, the court recognized that although the community would no doubt be interested in these issues, "the fact that an employee speaks up on a topic that may be deemed one of public import does not automatically render [her] remarks on the subject protected." 42 F.3d at 410 (citation and quotation marks omitted). Additionally, the court noted that Cliff only complained in response to criticism directed at her classroom performance in her annual reviews.

The entire eight page *Yes, Virginia* memorandum does not state that the student had filed a sexual harassment complaint against Bonnell, or even use the term sexual harassment. It is totally directed toward a discussion of the English language.

This indicates that Bonnell's motive in writing the *Yes, Virginia* memorandum was not to retaliate for a sexual harassment complaint, but instead to discuss First Amendment concerns in the context of classroom language.

In the instant case, the issue relating to speech in class transcends the more personal, individual matters of class size and discipline in *Cliff*. These are matters of significant public First Amendment concerns.

2. *Pickering* Balance Test

The First Amendment provides teachers, especially professors, academic freedom which "emphasizes the essentiality of free public expression of ideas." *Dambrot*, 55 F.3d at 1189. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967), the Supreme Court elaborated:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

(citation omitted).

Bonnell has substantial protectable interests because his speech related to matters of public concern. Yet, the Court recognizes that the First Amendment does not provide him with *carte blanche* authority to trump the interests of his students to be free from retaliation for filing sexual harassment complaints. However, given this balancing test, it is important to note that the MCC Defendants ruled that the sexual harassment complaint, which related to classroom language not directed to any particular person, was without merit.

The complaint procedure of MCC's Sexual Harassment policy specifies:

> To protect the interests of the complainant, the alleged sexual harasser, witnesses, any others who may report incidents of sexual harassment, and all other persons affected, confidentiality will be maintained to the extent practicable and appropriate under the circumstances.

(Sexual Harassment Policy, Rev. May 20, 1997, § II at 2; MCC Defendants' Response, RMPI, Ex. 14.) This is in line with the MCC and MCCFO agreement stating that "care must be taken to preserve confidentiality during the entire process [of handling students' complaints of faculty.]" (Agreement, Art. VIII.A.7, Complaint Ex. A.) In addition, the policy prohibits retaliation:

> Macomb Community College shall assure that no individual shall be retaliated against for making a complaint of sexual harassment, opposing sexual harassment, or participating in

> an investigation under this policy, regardless of whether a policy violation is found.

(Sexual Harassment Policy, § III.D. at 4.)

Webster's dictionary defines "confidential" as "Communicated or effected secretly." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 297 (1988). Bonnell redacted the complainant's name and class. This maintained the confidentiality of the complainant. Thus, Bonnell's concern was to deal with the language contained in the complaint and not the specific complainant. Indeed, it was the MCC Defendants who subsequently released the complainant's name to the public, with her permission.

The law is unsettled as to whether the release of a redacted complaint would be a violation of the FERPA. *Compare Warner v. St. Bernard Parish School Board,* 1998 U.S. Dist. LEXIS 1360, No. CIV.A. 96-1839, 1998 WL 50016 (E.D. La. Feb. 5, 1998) (FERPA violated when teacher sent newspaper a letter from a student's mother which expressed the mother's controversial views) *with Red & Black Publishing Co., Inc. v. Board of Regents,* 262 Ga. 848, 427 S.E.2d 257 (Ga. 1993) (records of students' violations of university policies not protected by FERPA). In the instant case, given the redaction of the complaint as to both her name and the class in which she was enrolled, this Court need not decide this issue.

The record before this Court does not support MCC's finding that Bonnell's actions constituted retaliation. For example, Bonnell explained that he passed out the redacted sexual harassment complaint to discuss in it his classes as he

believed that the complainant had dropped his class, and he would not have done so if she were present in his class:

> Q. . . . If [the complainant] was [in class], you would have given [the complaint] to her, right?
>
> A. No.
>
> Q. Why not?
>
> A. Because I knew that it would include her. It would be her.
>
> Q. You knew that then she would know that the focus of the discussion was on her complaint, right?
>
> A. Yes. Part of the focus was on her complaint. The discussion on academic freedom was triggered by her document.
>
> Q. You didn't need a document to have an academic discussion?
>
> A. Sure. I used that context.
>
> Q. You are not giving it out if she happened to be in class is obviously related to the fact that she made the complaint?
>
> A. Yes.
>
> Q. And the focus of her was the discussion, and what she said, right?

> A. If she had been there, I would think it might have been retaliation, but there was none, and it didn't appear. I assumed she dropped, and it was closed as far as she was concerned.

(Transcript of Motion Hearing, Bonnell Testimony, August 3, 1999 at 84.) The facts appear to be that the complainant did not drop the class but instead stopped attending. (*Id.* at 86-87.) Nevertheless, Bonnell's testimony indicates that his conduct was not directed at the complainant.

The issue is whether the First Amendment protects the publication of Professor Bonnell's *Yes, Virginia* memorandum attached to a copy of the sexual harassment complaint filed against him that redacts the name of the complainant and her class. The Court holds that it does. Based on the content, form, and context of the distribution, Bonnell's speech relates to matters of a public concern, and was not done in retaliation for a complaint of sexual harassment.

Thus, the Court concludes that Bonnell has a significant likelihood of success on the merits of his claim that the MCC Defendants suspended him in violation of his rights under the First Amendment.

C. Other Preliminary Injunction Factors

The third factor in evaluating a motion for preliminary injunction is the probability that granting the injunction will cause substantial harm to others. In the instant case, granting the injunction will not cause harm to the MCC Defendants. Failure to grant the injunction will cause significant harm to

the Plaintiff who has already been suspended from teaching for seven months, and further harm to MCC students who wish to enroll in his classes. Indeed, Dr. Bellanca testified that "I realize that students think that he's an outstanding teacher, and I respect that . . . ." (Transcript of Motion Hearing, Bellanca Testimony, July 30, 1999 at 221).

Finally, the Court must examine whether the public interest is advanced by the issuance of the injunction. As this factor is similar to the *Pickering* balancing test, the Court relies on the analysis, *supra*, and determines that the First Amendment interests of Plaintiff and the public are advanced by the issuance of this injunction to reinstate Professor Bonnell at MCC.[19]

---

[19] The YALE UNIVERSITY, REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE (1975) noted:

> The primary function of a university is to discover and disseminate knowledge by means of research and teaching. To fulfill this function a free interchange of ideas is necessary not only within its walls but with the world beyond as well. It follows that the university must do everything possible to ensure within it the fullest degree of intellectual freedom. The history of intellectual growth and discovery clearly demonstrates the need for unfettered freedom, the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable. To curtail free expression strikes twice at intellectual freedom, for whoever deprives another of the right to state unpopular views necessarily also deprives others of the right to listen to those views. We take a chance, as the First Amendment takes a chance, when we commit ourselves to the idea that the results of free expression are to the general benefit in the long run, however unpleasant they may appear at the time. The validity of such a belief cannot be demonstrated conclusively. It is a belief of recent

historical development, even within universities, one embodied in American constitutional doctrine but not widely shared outside the academic world, and denied in theory and in practice by much of the world most of the time.

Because few other institutions in our society have the same central function, few assign such high priority to freedom of expression. Few are expected to. Because no other kind of institution combines the discovery and dissemination of basic knowledge with teaching, none confronts quite the same problems as a university.

(*Id.* at 5-6).

Above all, every member of the university has an obligation to permit free expression in the university. No member has a right to prevent such expression. Every official of the university, moreover, has a special obligation to foster free expression and to ensure that it is not obstructed.

(*Id.* at 7.)

If expression may be prevented, censored or punished, because of its content or because of the motives attributed to those who promote it, then it is no longer free. It will be subordinated to other values that we believe to be of lower priority in a university.

The conclusions we draw, then, are these: even when some members of the university community fail to meet their social and ethical responsibilities, the paramount obligation of the university is to protect their right to free expression. This obligation can and should be enforced by appropriate formal sanctions. If the university's overriding commitment to free expression is to be sustained, secondary social and ethical responsibilities must be left to the informal processes of suasion, example, and argument.

(*Id.* at 8-9.)

Based on an examination of the four factors relevant to the issuance of a preliminary injunction, the Court GRANTS Plaintiff's renewed motion for preliminary inunction.

V. CONCLUSION

The Defendants assert that Plaintiff's publication of the redacted complaint and the *Yes, Virginia* response were likely to stifle potential student sexual harassment complaints by publically maligning and intimidating the instant complainant. On the other hand, the Defendants concede that they concluded early on that the instant complaint about classroom language was not a valid sexual harassment complaint. Indeed, the Defendants informed Bonnell of that finding on December 18, 1998. Defendant MacQueen stated, as the meeting with Bonnell broke up:

> I made the remark that this is not a sexual harassment case, as we do not view this as a sexual harassment case.

(Transcript of Motion Hearing, MacQueen Testimony, July 30, 1999 at 78.)

Further, as to the May 25, 1999 MCC investigative meeting with Professor Bonnell that his personal attorneys were permitted to attend, MacQueen testified:

> Well, we were concerned whether he had discussed his discipline with his students in the spring term, the spring 1999 term, and

whether he had distributed the memorandum styled "Yes, Virginia" to the students or to the media.

(Transcript of Motion Hearing, MacQueen Testimony, July 30, 1999 at 94.) Thus, MCC was concerned about two areas of conduct, both of which involved significant First Amendment considerations. First, Bonnell's speaking to his English students about his being suspended from teaching due to his use of the English language. Second, Bonnell's distribution of his *Yes, Virginia* memorandum discussing the "Sanity Clause," to wit, freedom of expression under the First Amendment, using, as context, a student letter challenging his expression, which had already been determined early on by MCC not to be a viable sexual harassment complaint.

The justification set forth in the July 9 Bellanca memorandum in support of the four month suspension, was "Breach of Confidentiality and Retaliation" by his distribution of the student complaint, and his *Yes, Virginia* memorandum.

Professor Bonnell acted to depersonalize his actions and protect the student's confidentiality by removing the complainant's name and class from the copies he distributed. The MCC Defendants, with the student's consent, published her name.

It is important to note that the Defendants first used the student's complaint as a basis to discipline Plaintiff Bonnell, not for sexual harassment, but for his use of what the Defendants determined to be improper, non-germane classroom language. In other words, what the MCC Defendants now contend was a sexual harassment complaint, was determined by them to not be a valid sexual harassment complaint. Indeed, the MCC Defendants appear to have used

that complaint as a basis for suspending Plaintiff for his classroom speech because they concluded that his speech was not protected by the First Amendment. Professor Bonnell reacted to that February 1999 classroom speech suspension by responding directly to the complaint about speech and MCC's action to restrict his speech in the classroom. Yet, when Bonnell took that same complaint, which had been a basis for suspending him for his language, and used it for necessary context to respond on the issue of his First Amendment rights, the MCC Defendants reversed field and now contend that the issue was really sexual harassment after all, and that Bonnell's response was retaliation against the student complainant. The MCC Defendants' argument lacks coherence.

Since the basis for the MCC suspension in February was classroom language as attributed to that complaint, in order to respond to that complaint-based suspension, it was logical that Bonnell utilize the complaint for necessary context.

Some of the language utilized by Bonnell in his *Yes, Virginia* memorandum was harsh, and some of it was directed to specific allegations of the anonymous complainant. Yet, it was necessary to utilize the complaint for context and to respond to it.

The Court finds that the redaction of the name and class of the complainant, and generalized discussion in the *Yes, Virginia* memorandum of the use of the English Language, albeit much of it not of the King's English, resulted in a discussion of the First Amendment rights of an English professor. Both the beginning of Bonnell's memorandum, which speaks of the "Sanity Clause," *i.e.*, the First Amendment, and its conclusion which recites the First Amendment, clearly indicate that Professor Bonnell was

discussing First Amendment issues. That the MCC Defendants, with the permission of the student complainant, chose to release her name is not a basis for terming Professor Bonnell's memorandum a specific retaliation against her.[20]

---

[20] A DETROIT NEWS editorial, *Capsizing Academic Freedom*, June 21, 1999, at 6A, captured the significance of Professor Bonnell's complaint. Comparing Professor Bonnell's situation with that of a local canoeist, who after capsizing used profane language in the presence of women and children, the editorial pointed out:

> Another free speech battle in the state was generally ignored, although its significance is far greater than the case of the potty- mouthed canoeist.
>
> John Bonnell, a popular and highly regarded English professor at Macomb Community College, was suspended four months ago for using pungent and graphic language during his classroom.
>
> This is part of Mr. Bonnell's teaching method. He claims it has been an effective way of reaching his students during his 32-year career and even cautions his classes at the start of each semester that they can expect to hear this sort of speech from him.
>
> Nonetheless, a student filed a complaint against him last January, and when Mr. Bonnell refused to alter his salty style he was suspended without pay. A lawsuit was filed, and the case is being argued in closed hearings at the college. Although Mr. Bonnell's case raises a serious issue of academic freedom, it does not have the media titillation factor of a soaked Mr. Boomer standing in the Rifle River and letting loose a stream of curses.
>
> Moreover, interference with free speech on campus has become an all-too-familiar story. College administrators, aquiver with sensitivity and keenly alert to lawsuits, repeatedly squelch speech or activity that conceivably may offend a government-certified and protected group.
>
> * * * *

Thus, while the MCC Defendants term the present four month suspension as being based upon a "Breach of Confidentiality and Retaliation," the facts presented to the Court do not support this finding. The redacted release of the complaint combined with the *Yes, Virginia* memorandum, given the facts behind the initial February suspension for language, and the MCC Defendants determination that this was not a valid sexual harassment complaint, do not sustain the suspension on this ground.

Finally, the Court notes that the MCC Defendants have already suspended Plaintiff Bonnell for seven months, thereby preventing him from teaching in the spring 1999 and summer 1999. The Court rejects the MCC Defendants' contention that this suspension was not a penalty because he received pay. The Court concludes that this suspension, which prevented him from pursuing his profession as an English teacher, has already imposed a significant penalty on him, and has deprived him of his First Amendment right to free speech in his classroom. Thus, even if the MCC Defendants could justify imposing on Bonnell a four month suspension from classroom teaching for breach of confidentiality and retaliation, that has already been served -- Bonnell has been suspended from teaching for the last seven months.

Accordingly, the Court concludes that a preliminary injunction should be issued requiring that Professor Bonnell

---

Mr. Bonnell, however, was engaged in instruction in a clearly defined space and had advised those who might be offended to seek other options. Many of his students have picketed in h ; behalf. Hopefully, the college's administrators will also demonstrate the clarity of understanding sho n by its students.

be reinstated immediately with pay to his teaching position at Macomb Community College.

SO ORDERED.

PAUL D. BORMAN

UNITED STATES DISTRICT COURT JUDGE

Dated: August 27, 1999
Detroit, Michigan

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 2, 2001]

No. 99-2047

JOHN C. BONNELL and NANCY L. BONNELL, Plaintiffs-Appellees,

v.

ALBERT LORENZO, WILLIAM MACQUEEN, and GUS J. DEMAS, Defendants-Appellants,

MARK COUSENS, Defendant.

BEFORE: NELSON, COLE, and CLAY, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
LEONARD GREEN, CLERK

Supreme Court, U.S.
FILED
AUG
OFFICE

No. 01-185

In The

Supreme Court of the United States

PROFESSOR JOHN C. BONNELL,
and NANCY L. BONNELL,

Petitioners,

v.

ALBERT LORENZO, WILLIAM
MACQUEEN, and GUS J. DEMAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUNTER L. WENDT
Counsel of Record
THOMAS P. BRADY
TIMOTHY S. FERRAND
JEFFREY A. STEELE
Attorneys for Respondents
1330 Buhl Building
Detroit, Michigan 48226
(313) 965-3700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether this case presents a significant issue involving the First Amendment protection of public employee speech on matters of public concern when the Court of Appeals concluded that Petitioner's public dissemination of a confidential student civil rights complaint and retaliatory response thereto (*"An Apology: Yes Virginia, There is a Sanity Clause"*) constituted protected speech "addressing a matter of public concern?"

II. Whether the Court of Appeals, having given petitioner the benefit of treating parts of his retaliatory conduct as "protected speech," correctly applied the standards required by *Pickering* and *Connick* in balancing Petitioner's interest in speaking the way he did against the College's interest not only in the overall "efficiency" of its publicly funded educational mission, but also the College's compliance with important statutory and contractual requirements, including (a) protecting sexual harassment complainants from retaliatory conduct, and (b) preserving the confidentiality of student records?

III. Whether there is a decision from another circuit that deviates in any significant respect from the Court of Appeals' application of *Pickering* and *Connick*?

PARTIES TO THE PROCEEDING

The Petition does not state that Mark Cousens, attorney for Petitioner's union, was dismissed from this case by the district court. Petitioner[1] accurately lists the parties to the proceeding in all other respects.

---

[1] Petitioner John Bonnell and his wife brought this lawsuit jointly. For ease of reference, Respondents will refer to John Bonnell as Petitioner, in the singular.

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Appendix A

Sexual Harassment Complaint filed against Petitioner on November 6, 1998, by a student enrolled in one of his classes [R. 17, Defendants' Response Brief, Exhibit 8, Reproduced in the Court of Appeals at APX 230.] A-1

Appendix B

An Apology: Yes Virginia, There is a Sanity Clause [R. 17, Defendants' Response Brief, Exhibit 12, Reproduced in the Court of Appeals at APX 232.] B-1

Appendix C

July 9, 1999, disciplinary memorandum issued by the College Provost [R. 69, Defendants' Supplemental Brief, Exhibit 2, Reproduced in the Court of Appeals at APX 419.] C-1

STATEMENT OF THE CASE

There is no material dispute concerning the underlying factual occurrences, which the Court of Appeals set forth in detail. Most of the speech at issue is in writing, as are the directives that Petitioner violated. During an internal meeting with college administrators, Petitioner and his counsel did not dispute the facts concerning his dissemination of the student complaint to students, faculty and the news media after having been warned in writing not to do so. Petitioner also admitted his distribution of a retaliatory attack on the student civil rights complainant and his use of vulgar language in the classroom. Petitioner failed to establish that the words he used in class were germane to course content.

The Student Sexual Harassment Complaint.

On November 9, 1998, a student filed a formal complaint with the College, charging that her English Composition teacher, Petitioner John Bonnell, sexually harassed her by graphically describing his personal sexual experiences and fantasies in class. The student complained that Petitioner used "lude [sic] and obscene . . . " language while making "dehumanizing, degrading, and sexually explicit . . . " comments in class.[2] The student

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[2] In 1992, the College introduced a policy stating that: "Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline." Based on past complaints, Petitioner had been warned in 1998 to stop using words such as " 'fuck, 'cunt,' and 'pussy' " unless they are

also reported that Petitioner made sex the "major content" of his class and "took advantage of his position to express his own previous sexual experiences" and "sexual escapades." The student indicated that she hesitated before filing her sexual harassment complaint because Petitioner used his position "as a platform for authority to intimidate his students not to complain about him" and "repeatedly made fun of students who had expressed offense or disgust and he also laughed at them."[3] [Appendix A.]

Investigatory Meetings.

In November of 1998, Dr. Gus Demas, Dean of Liberal Arts, informed Petitioner of the complaint and that a meeting was scheduled to discuss it. Petitioner responded by distributing the complaint, with the student's name redacted, to his students and posting it in the English Department.

During the disciplinary meeting in early December, 1998, at which Petitioner was accompanied by union officials and his union's attorney, Petitioner admitted that he

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"germane to a discussion of appropriate course materials. . . . " Petitioner responded to these warnings by asserting that vulgar language "reflects who I am and it gets the students' attention."

[3] The College has never admitted that the complaint was "unfounded." The College simply determined that the conduct the student complained about did not state a sustainable sexual harassment claim because it had the tendency to offend men and women equally. Petitioner has never disputed the factual basis of the student's complaint or the fact that the student honestly believed she had been sexually harassed by Petitioner.

used phrases such as "blow job," "tits," "balls" and "butt-fucking" in class. Petitioner was given the chance to explain how this language was germane to class. He did not. The College scheduled a formal hearing later that month, during which Petitioner was given another opportunity to explain how the language he used was germane. Again, Petitioner failed to explain how the vulgar language he admittedly used was germane to class. [*See, e.g.*, R. 17, Defendants' Response Brief, Exhibit 10, Affidavit of William MacQueen, ¶¶ 2-4 ("Plaintiff did not explain how his use of vulgar language was related to the class material" during either the internal investigatory meeting or the hearing in December of 1998); *An Apology*, p. 3 (Petitioner admitted that, during an internal investigatory meeting and a hearing in December of 1998, he "possibly failed to make the fullest explanation" of how his vulgar language was germane); R. 28, Plaintiff's Reply Brief, Exhibit A, Transcript of Faculty Senate Meeting, p. 7 (Petitioner admitted to his union that, when questioned in December of 1998, he "did not remember context" and otherwise failed to explain how his vulgar language was germane to course content).]

Post-Investigation Discipline.

In January of 1999, Dr. Demas suspended Petitioner for three days. The suspension was based on the conclusion that Petitioner violated the College's policy against gratuitous use of vulgar language in class by regularly using words and phrases in class such as "shit," "damn," "fuck," "ass," "butt-fucking" "blow job" and "tits on a

nun are as useless as balls on a priest" even though such language was not germane to course content.[4]

Petitioner's Campaign To Protest His Personal Employment Situation And Retaliate Against The Student Complainant.

Consistent with the student complainant's fears, and in violation of federal and state anti-retaliation and student privacy law, the governing collective bargaining agreement, the College's anti-harassment policy and an oral directive, Petitioner distributed the student's complaint to the faculty, along with a lengthy attachment entitled: *"An Apology: Yes, Virginia, There is a Sanity Clause"* (*"Apology"*) [Appendix B.] Petitioner admitted in

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[4] Petitioner claims in his Petition that his vulgar language and graphic sexual discussions in class were "never gratuitous, were always germane to course content" and had a specific educational purpose. Again, this is not the position Petitioner took before the College suspended him for three days. Petitioner was afforded two opportunities in December of 1998 to explain how the language in question was germane to course content. He failed to do so. Petitioner has never contested the accuracy of MacQueen's affidavit, included in the record below at R. 17, Exhibit 10, which states that Petitioner did not explain how his language was germane to course content before his three-day suspension. The contradictory explanations Petitioner has given for his use of the language (*i.e.*, statements made in briefs, his affidavit and in his *"Apology"*) were all drafted or distributed after Dr. Demas imposed the three-day suspension. For example, Petitioner's allegation that the words and phrases were employed as a means to instruct students how certain authors were forbidden from using certain language is a new argument before the Court which is unsupported by any record evidence.

his *Apology* that he wrote his *Apology* to protest the College's investigation of the student complaint. He also admitted that he directed his *Apology* to "any possible student who complains in the fashion . . . " the student complainant did. [Joint Appendix, at 698, 8/3/99 Hearing, at 47.]

"*An Apology*," which purports to be the apology the student complainant had requested in her sexual harassment complaint, is an articulation of and defense against the charges the student and the administration lodged against him, as well as an attack that ridicules, demeans and belittles both the student complainant and the College administration. Petitioners *apology* insults the student by using phrases in reference to her such as: "When, at length, you grow up . . . " and "The only persons in my classes who are stirred, in any antisocial sense, by my diction are either the very unfortunately 'wired,' on the one hand, or the very young, Virginia, on the other." It suggests that filing a sexual harassment complaint against him is cowardly and underhanded, stating "Shame on you, Virginia – so very young and yet so devious" and characterizes a student's assertion of her civil rights as "terrorist's tactics. . . . " The document also lashes out at the College, referring to William MacQueen, Vice President for Human Resources, as "the grand inquisitor," calling an administrative policy "bullshit," implying that the College administrators are Nazis and charging that "the majority of administrators . . . give neither fig nor rat's derriere for real students' interests. . . . " [Appendix B.]

In addition to demeaning the complaining student, Petitioner admitted in his *Apology* that he had failed to

explain why he had used the vulgar language in class during the investigatory meeting and hearing in December. [Appendix B, p. 3.]

The College Instructed Petitioner To Stop His Illegal Conduct.

After learning of Petitioner's insubordinate, retaliatory conduct and dissemination of confidential documentation, MacQueen gave Petitioner a written directive, stating:

> Because your posting, distribution and discussion of student complaints of sex harassment . . . conveys the message that complaining students may expect to be ridiculed by you and ostracized by their classmates, and thus may be deterred from complaining, you are hereby directed not to post, distribute, or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment . . . with any person enrolled in one or more of your classes unless written permission has been granted by [Provost] Dr. Rose Bellanca upon application of your union attorney. This prohibition extends to discussion of any disciplinary action which has or may be taken against you.

Petitioner then violated this written directive by disseminating the confidential student complaint to a local newspaper, television stations and "one of the more

outspoken" students.[5] Petitioner also defied the directive by insubordinately informing his students, in class, that he had been suspended.

The Suspension With Pay.

Based on this and other suspected misconduct, the College notified Petitioner that he was suspended, with pay, pending an investigation into whether Petitioner abused his grading authority, disobeyed administrative directives and insubordinately disseminated a confidential student record in violation of federal law. Petitioner thereafter brought this lawsuit under 42 U.S.C. §§ 1983 and 1985, claiming, *inter alia*, that the steps set forth above violated his First Amendment right to "academic freedom."

Provost Bellanca Decided To Suspend Petitioner Without Pay.

At an investigatory meeting in May, 1999, Petitioner admitted to most of the issues of misconduct, such as his public distribution of the student's sexual harassment complaint and the *Apology* response. Provost Bellanca

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[5] There is no record evidence to support Petitioner's claim, made for the first time in his Petition, that Petitioner's motivation for publishing the student complaint was to encourage "any student with similar views [to] inform the professor, the class or the College." Respondents submit that this new contention is belied by the text of Petitioner's *Apology*, which sarcastically attacks and demeans the student for complaining.

thereafter announced her decision to (1) reprimand Petitioner for disrupting the educational process; (2) suspend Petitioner for fourteen days for insubordination; and (3) suspend Petitioner for four months for breaching confidentiality and retaliating against the student who filed a sexual harassment complaint against him. [Appendix C.] Petitioner's use of non-germane vulgarity in class played no role in this four-month suspension.

The Proceedings Below.

Following several hearings, two days of testimony and closing arguments, the district court issued an opinion and order granting *Plaintiff's Renewed Motion for Injunctive Relief* with regard to the four-month suspension and ordering Petitioner's immediate "reinstatement," with pay. *Bonnell v. Lorenzo*, 81 F. Supp. 2d 777 (E.D. Mich. 1999). On March 1, 2001, the Sixth Circuit held that the district court had abused its discretion in enjoining the four-month disciplinary suspension and reversed the order granting injunctive relief. *Bonnell v. Lorenzo*, 241 F.3d 800, 824-825 (6th Cir. 2001).

REASONS FOR DENYING THE PETITION

I. This case does not present a significant issue involving the First Amendment protection of public employee speech on matters of public concern because the Court of Appeals concluded that Petitioner's public dissemination of a confidential student civil rights complaint and retaliatory response thereto (*"An Apology: Yes Virginia, There is a Sanity Clause"*) constituted protected speech "addressing a matter of public concern."

Petitioner paints an alarming picture about the ramifications of the Court of Appeals' holding, suggesting that it allows college administrators to "stop discussions of sensitive but legitimate topics" such as love, relationships, death and alleged harms to academic freedom. Contrary to Petitioner's dramatic characterizations, however, the Court of Appeals did not adopt a speech-restrictive approach. The Court of Appeals took a speech-permissive approach to this dispute, agreeing with Petitioner's assertion that his distribution of the student sexual harassment complaint and retaliatory response constituted protected speech "addressing a matter of public concern."

Petitioner's rhetoric about the "Orwellian tactics" of precluding public employees from addressing certain topics in public is also unavailing. The College did not discipline or threaten to discipline Petitioner for discussing academic freedom in public or for publicly complaining about the College's policy prohibiting non-germane vulgarity in class. The College simply took issue with Petitioner's decision to insubordinately release a student's confidential civil rights complaint and Petitioner's

decision to conduct himself in a manner that constituted illegal retaliation against a civil rights complainant. In holding that the College's interest in prohibiting such conduct outweighed Petitioner's interest in retaliating against a civil rights complainant and releasing a confidential student record, the Court of Appeals did not hold that public institutions can keep public employees from discussing important topics in public. The Court simply held that while Petitioner may discuss sensitive issues in public, the College has a predominant interest in making sure he does not violate federal and state law while doing so. Accordingly, Petitioner's predictions regarding the impact of the Court of Appeals' decision are baseless. Indeed, the Court of Appeals concluded its opinion by expressing its "deep commitment" to a speech-tolerant construction of the First Amendment. *Bonnell, supra,* 241 F.3d at 826.

Moreover, the language-in-class issue framed by Petitioner does not resemble the record in the litigation below. There are no facts in the record to raise the issue whether a college can or should require teachers to alter course content to satisfy hypersensitive students. Nor is this a situation where a college has disciplined a teacher simply because a student found something offensive and claimed it constituted sexual harassment. The language-in-class dispute, which was not the basis for the four-month suspension the district court and the Sixth Circuit addressed below, simply concerns whether a publicly-employed teacher violated a clear, well-promulgated policy prohibiting teachers from using words like "fuck," "cunt," "pussy," "blow-job," "tits" and "shit" in class

unless those words are related to course content. Petitioner was repeatedly reminded of this policy and personally warned that continued use of such language in class, unless germane to course content, would result in discipline. It was Petitioner's continued use of such language that required the three-day suspension.

Not only is there an absence of any language in the Court of Appeals' opinion that could be read in the speech-restrictive manner Petitioner suggests, but the Sixth Circuit demonstrated the contrary earlier this month in *Hardy v. Jefferson Community College and Kentucky Community and Technical College System*, ___ F.3d ___ 2001 WL 912804 (6th Cir. 2001). In *Hardy*, the Sixth Circuit held that a teacher cannot be disciplined for germane classroom vulgarity that a student finds offensive. The court thus recognized the distinction between germane classroom speech that has a tendency to offend, which it held is protected, and the non-germane vulgarity Petitioner used. *Id.* Accordingly, Petitioner's inflammatory claims that the Court of Appeals' opinion in this case would result in student-dictated course content, censorship of scholarly opinion and prior restraints are wholly unfounded.

II. The Court of Appeals, having given petitioner the benefit of treating parts of his retaliatory conduct as "protected speech," correctly applied the standards required by *Pickering* and *Connick* in balancing Petitioner's interest in speaking the way he did against the College's interest not only in the overall "efficiency" of its publicly-funded educational mission, but also the College's compliance with important statutory and contractual requirements, including (A) protection of sexual harassment complainants from retaliatory conduct, and (B) confidentiality of student records.

This Court has repeatedly held that a state has rights to regulate the speech of its employees that "differ significantly from the rights it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Where, as the Court of Appeals held in this case, Petitioner spoke on a matter of public concern, his public employer may regulate the speech if the Petitioner's interests, "as a citizen, in commenting upon matters of public interest," do not outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering, supra*, 391 U.S. at 568.

The Court of Appeals correctly applied this Court's precedents in holding that respondents' interest in disciplining Petitioner outweighed petitioner's negligible interest in speaking as he did. Petitioner conceded that he could have discussed the First Amendment, academic freedom or the College's germaneness policy without releasing the confidential student complaint or attacking and retaliatiating against the student who filed a sexual harassment complaint against him. (Joint Appendix at

722, 8/3/99 Hearing, at 71). The College, on the other hand, had compelling interests in disciplining Petitioner for these actions.

For example, the College reasonably believes that Petitioner's conduct constituted illegal retaliation against the complainant for asserting her civil rights, in violation of the *Michigan Civil Rights Act*, M.C.L. § 37.2701; M.S.A. § 3.548(710); *Title IX of the Civil Rights Act of 1964*, 42 U.S.C. § 2000e-3(a), *see* 20 U.S.C. § 1681. EEOC Regulations, *see, Guidance on Investigating, Analyzing Retaliation Claims*, and the College's sexual harassment policy. The College had a powerful interest in complying with its obligation under federal and state civil rights law to prevent such illegal retaliation. *See Rubin v. Ikenberry*, 933 F. Supp. 1425 (C.D. Ill. 1996) (upholding discipline where a professor retaliated against two students who had complained that they were sexually harassed by the professor's sexual commentary in class by discussing the students' complaints in class); *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986) (anti-retaliation laws are designed, in part, to preclude the chilling effect of frightening people away from asserting their civil rights due to adverse treatment incurred by other complainants).

In addition, Respondents reasonably believed that Petitioner's unauthorized distribution of the student's sexual harassment complaint, a student record that may not be released without authorization under the *Family Educational Rights and Privacy Act* ("*FERPA*"), 20 U.S.C. 1232g, violated *FERPA*, the confidentiality provision in the College's Sexual Harassment Policy, and Article VIII.A.7. of the Collective Bargaining Agreement between the College and Petitioner's union. [Joint Appendix, at 259.] The College had a compelling interest in complying

with these statutes, policies and contractual obligations. *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) ("the need for confidentiality" is one of the interests of a college that will override a professor's "right" to speak even on issues which might be of public concern).

Moreover, the College had a strong interest in preventing the disruption of the academic process caused by Petitioner's insubordinate decision to inform his students that he had been suspended, thereby inspiring most of his students to skip class and stage a disruptive scene even though the College had provided a substitute teacher during his three-day suspension. [*See Appendix C, C-2-C-4.*] *See Pickering*, 391 U.S. at 572-573 (the state can restrict educators' speech if the speech "impede[s their] proper performance of . . . daily duties in the classroom or . . . interefere[s] with the regular operation of the schools generally"); *Anderson v. Evans*, 660 F.2d 153 (6th Cir. 1981) (school's interest in maintaining efficient, regularly functioning school system outweighed interest of tenured teacher in making remarks reflecting her attitude about African-Americans).

The College's failure to protect and enforce these interests could have subjected it to damaging and costly consequences, such as expensive and unnecessary lawsuits and a potential loss of federal funds. The Court of Appeals correctly held that the College's interests, several of which involve its duty to comply with statutory and contractual obligations, outweigh Petitioner's decision to release confidential documents and retaliate against a civil rights complainant.

Petitioner argues that the College's interests should be dismissed because they are "speculative" and because the College's "damages" are, at least at this point, allegedly "non-existent." In other words, Petitioner would preclude pro-active measures and require the College and, presumably, all public employers to let their employees continue their unlawful conduct until the reasonably feared consequences of such conduct actually materialize. Petitioner fails to cite this Court to any authority to support this proposition and, indeed, no such authority exists. To the contrary, this Court made it clear in *Waters v. Churchill*, 511 U.S. 661 (1994), that a public employer is not required to wait until its reasonable fears come true; it may act prospectively to discipline employees if the employer reasonably believes the speech or conduct may damage its public mission. *Id.* at 673 ("we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large"); *Connick v. Myers*, 461 U.S. 138, 151 (1983), *quoting Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (" 'the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch' ").

III. There is no decision from another circuit that deviates in any significant respect from the Court of Appeals' application of *Pickering* and *Connick*.

A. There is no conflict on the issue of whether the College's interests in disciplining Petitioner for retaliatory conduct and breach of confidentiality outweighed the Petitioner's speech interests.

Petitioner has not even attempted to identify a split in the circuits on the issue of whether the College's interests in disciplining Petitioner for retaliating against a civil rights complainant and breaching confidentiality outweigh his interests in speaking as he did. Nor does such a conflict exist. Respondents are aware of no Court of Appeals' decisions that conflict with the fact-intensive balancing the Sixth Circuit performed in this case. Accordingly, and where the Court of Appeals in this case applied a well-established framework for resolving issues arising from employer-imposed limitations on a public employee's speech, there is no reason to review the Sixth Circuit's holding that balancing favored the College.

B. There is no conflict on the issue of a public educational institution's right to discipline a teacher for using vulgarity in the classroom that is not germane to course content.

In an effort to create a conflict on the language-in-class issue, Plaintiff makes the simplistic claim that "First Amendment rights are not uniformly interpreted or enforced in this country on campuses of higher learning or in appellate courts." Petitioner then cites to a loosely

connected spectrum of cases that reach different results on various First Amendment-related issues. The supposed conflict is illusory. Petitioner cites but two cases, *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986) and *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995), that directly address a teacher's alleged right to use vulgar language while teaching. Both of those cases, which were cited in and are consistent with the Sixth Circuit's opinion in the case at bar, upheld a college's right to discipline a teacher for non-germane profanity. Plaintiff does not cite to a single case that conflicts in any material way with the holdings or rationale of these Court of Appeals' opinions.

The other cases to which Petitioner cites – cases Petitioner uses to support the alleged conflict – deal with distinguishable issues bearing no resemblance to the narrow issue the Sixth Circuit addressed. Two of the cases Petitioner cites, *Nunez v. Davis*, 169 F.3d 1222 (9th Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) and *Bonds v. Milwaukee County*, 207 F.3d 969 (7th Cir.), *cert. denied*, 531 U.S. 944 (2000), do not even involve academic institutions, let alone the issue of whether an academic institution may constitutionally control class content or proscribe non-germane vulgarity in class. The school-related cases Petitioner cites, *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) and *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997), are also inapposite. *Saxe* involved a vagueness/overbreadth challenge to a campus-wide harassment policy that some students thought might hinder their right to freely exercise their religious convictions. *Burnham* involved a challenge to a school's content-based decision to remove certain photographs from a showcase located in a public corridor. Neither case addressed a college's interest in proscribing non-germane vulgarity in

class. Indeed, the *Saxe* court (where the challenge was not made by a public employee and the *Connick/Pickering* analysis was therefore not involved) suggested that its analysis may be different if the speech in question has been school-sponsored speech or if there was some legitimate pedagogical reason to restrict the speech in question.[6] *Saxe, supra,* 240 F.3d at 213, 214.

The issue Petitioner attempts to raise is whether the College can constitutionally suspend him for three days for saying "fuck," "butt-fucking," "pussy," "cunt," "tits," "blow job" and "shit" in class even when the words bear no relationship to the subjects his students were paying to learn. This issue is not ripe for this Court's review, however, because the language-in-class issue did not form the basis of the four-month suspension the lower courts addressed. Regardless, the College believes that disciplining Petitioner for using non-germane vulgarity

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[6] Although *Cohen v. San Bernardino Valley College,* 92 F.3d 968 (9th Cir. 1996), may appear on a superficial reading to concern a college's right to proscribe vulgar language in class, the Ninth Circuit expressly avoided that issue. *Conen, supra,* 92 F.3d at 972 ("We do not decide whether the College could punish speech of this nature . . . "). The Ninth Circuit in *Cohen* simply held that the wide-ranging, campus-wide anti-harassment policy that the college used as a basis for disciplining a professor was unconstitutionally vague and overbroad. Unlike the policy at issue here, however, the policy in *Cohen* was not limited to classroom language or non-germane class discussions. Also unlike this case, the policy in *Cohen* was used as a basis for discipline even though the professor had no reasonable warning that his conduct may violate the policy. Here, on the other hand, Petitioner was given a series of warnings which specifically forbade the language in question and clearly warned him that further use of such language, unless germane to course content, would lead to discipline.

in class keeps classroom discussions topical, facilitates a better and more universally efficacious learning environment, bolsters its academic reputation and facilitates student recruitment and retention without detracting from the quality of its students' education. Moreover, the College is legally obliged to provide a learning environment free from objectively offensive harassing conduct and comments. *Franklin v. Gwinett County Public Schools*, 503 U.S. 60 (1992) (colleges can be held liable for their professors' sexual harassment of students). The Courts of Appeals have resolved pedagogical disputes such as this in favor of academic institutions, not the individual teachers they employ, and have consistently held that academic institutions may constitutionally control class content and restrain its employees' use of non-germane vulgarity in class. *See, e.g., Hardy v. Jefferson Community College and Kentucky Community and Technical College System*, ___ F.3d ___ 2001 WL 912804 (6th Cir. 2001) (reaffirming that a College has a right to prohibit non-germane vulgarity in class); *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000), *cert. denied*, ___ U.S. ___ (2001) (individual educators enjoy no First Amendment right to academic freedom); *Dambrot*, 55 F.3d at 1189 (college basketball coach had no right to use the word "nigger" when teaching/coaching); *Martin*, 805 F.2d 583 (college professor has no First Amendment right to use vulgar language while teaching class); *Boring v. Buncombe Co. Bd. of Ed.*, 136 F.3d 364 (4th Cir.), *cert. denied*, 119 S. Ct. 47 (1998) (teacher had no constitutional right to ignore administrative direction and present a play containing potentially objectionable sexual themes); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992) (college professor

had no First Amendment or academic freedom right to disregard his employer's academic direction and discuss in class his theory that religion plays a role in human physiology); *Bradley v. Pittsburgh Bd. of Ed.*, 910 F.2d 1172, 1176 (3rd Cir. 1990) (teachers' rights do not extend to "choosing their own curriculum or classroom management techniques in contravention of school policy or dictates"); *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("public school teachers are not free, under the first amendment, to arrogate control of curricula . . . "); *Lovelace v. Southeastern Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("first amendment does not require that each nontenured professor be made a sovereign unto himself" with respect to course content); *Adams v. Campbell County School Dist.*, 511 F.2d 1242 (10th Cir. 1975) (dismissal of a teacher for failing to keep discipline in class, being too informal, discussing current events, and playing records in class was permissible); *Clark, supra*, 474 F.2d at 931 (a college professor's "disputes with his superiors and colleagues about course content and counseling were not 'matters of public concern' and involved [the professor] as a teacher rather than an interested citizen"); *Ahern v. Bd. of Ed. of Sch. Dist. of Grand Island*, 456 F.2d 399, 403, 404 (8th Cir. 1972) ("Simply stated, our conclusion is that Miss Ahern was invested by the Constitution with no right either (1) to persist in a course of teaching behavior which contravened the valid dictates of her employers, the public school board, regarding classroom method, or (2), as phrased by the district court, 'to teach politics in a course in economics' "); *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) ("free speech does not grant teachers a

right to say or write in class whatever they may feel like . . . "); *Valeria G v. Wilson*, 12 F. Supp. 2d 1007, 1027 (N.D. Calif. 1998) ("This amicus also argues that teachers have an absolute First Amendment right to teach whatever they want in the classroom. This court does not believe that the scope of the First Amendment goes that far. Courses and methods of instruction can be and are governed by state and local school district regulations, without violation of the First Amendment rights of teachers."); *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) ("[t]he academic institution enjoys a position of supremacy in addressing curriculum content"); *Scallet v. Rosenblum*, 911 F. Supp. 999, 1006, 1017 (W.D. Va. 1996), *aff'd*, 106 F.3d 391 (4th Cir.), *cert. denied*, 521 U.S. 1105 (1997) (college professor's classroom discussions that were outside the scope of the course were "not protected by the First Amendment" because the administration's duties to establish curriculum "outweighs [the college professor's] interest in teaching his own material. . . . "); *Mercer v. Mich. St. Bd. of Ed.*, 379 F. Supp. 580, 585 (E.D. Mich.), *aff'd*, 419 U.S. 1081 (1974) ("There is nothing in the First Amendment that gives a person employed to teach the constitutional right to teach beyond the scope of the established curriculum. Nor are there any judicial decisions giving the teacher the right to teach beyond an established curriculum").

If colleges and universities did not have a preeminent right to control classroom content, colleges and universities would be at the mercy of their teachers, and there would be no constitutional way to prevent a professor from wasting class time, illegally harassing students,

adopting ineffective teaching styles or relaying information in a way the school considered to be an absurd, unhelpful or even detrimental way to teach a particular discipline. As the Court of Appeals in this case held below after reviewing all the facts and the entire record:

> To hold otherwise under these circumstances would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent, and such a result would fail to consider the countervailing interests. [*Bonnell*, 241 F.3d at 824.]

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

HUNTER L. WENDT
Counsel of Record
MACOMB COMMUNITY COLLEGE
Corporate Counsel
14500 East Twelve Mile Road
Warren, MI 48088

THOMAS P. BRADY
JEFFREY A. STEELE
BRADY HATHAWAY BRADY & BRETZ, P.C.
1330 Buhl Building
Detroit, MI 48226
(313) 965-3700

TIMOTHY S. FERRAND (P39583)
CUMMINGS, MCLOREY, DAVIS & ACHO, P.C.
25509 Kelly Road, Suite C
Roseville, MI 48066
(810) 775-5300

Attorneys for Respondents

APPENDIX A

November 6, 1998

To whom it may concern:

This is a letter of formal complaint against Professor John Bonnell. I am currently a student in Mr. Bonnell's class, English 122 from 8-9:30 PM on Mondays and Wednesdays. My complaint against Mr. Bonnell is sexual harassment. Due to the fact that this is a very serious charge, I will substantiate this charge in an oral interview.

Beginning in middle to late September the atmosphere of the class started to change from comfortable to extremely offensive. Mr. Bonnell began using lude and obscene comments. These comments stemmed from English stories that we were reading in class, and he decided to add his own personal comments. These comments were dehumanizing, degrading, and sexually explicit. Some of the stories that were required reading revealed sexual innuendoes and implications. This should have been dealt with in a professional and appropriate manner, yet Mr. Bonnell displayed a lack of maturity, sensitivity, and responsibility, by taking advantage of the conversations to express his own previous sexual experiences. If this class had been a psychology or human sexuality class, I might have understood more of why sex was the major content of our class. This was supposed to be an English class and I feel cheated out of my money because I paid tuition to learn English. I did not pay to hear about Mr. Bonnell's sexual escapades. I feel that he also used his teacher position as a platform for authority to intimidate his students not to complain about him. Mr. Bonnell repeatedly made fun of students who had

expressed offense or disgust and he also laughed at them. This is one of the reasons why I did not come forward sooner. I feel compelled to speak up now so as to save further embarrassment to Macomb Community College. I, as a student, and as a wife have been strongly affected mentally and emotionally due to the sexual harassment from Mr. Bonnell. My husband and I are fully prepared to take this sexual harassment complaint to the highest level of authority it can go.

My goals of filing this complaint is to, at the very least, receive credit for English 122, and a written apology from Mr. Bonnell. I also would like Mr. Bonnell to be dismissed from the college immediately. Mr. Bonnell also needs to go to a counselor to discuss his sexual problems. I would also like Mr. Bonnell to be denied all access to my and my husbands social security numbers, student accounts, address, and telephone numbers. I expect and demand that this sexual harassment be taken seriously and given top priority. Thank you for acting immediately and swiftly in this matter.

Sincerely,

Susannah D. Derouin

APPENDIX B

An Apology: Yes, Virginia, There is a Sanity Clause

Young lady, before identifying the clause in the title, and as a preface to the apology you desire, let me review the two articles of impeachment which you have preferred against me. First, there is the one count of butt-fucking; second, there are the three counts of blow-job. The first charge all by itself, I must confess, would inspire squeals of protest even from the most asinine, the most cheeky. The second charge, on the face of it, is more than your average mouthful. I marvel at your courage in bringing notice of these alleged outrages to the proper authority, and I am amazed by the modest remedy you require.

In short order, I was summoned before the college's highest tribunal where the grand inquisitor himself, with the support of sundry assistants, subjected me to rigorous cross-examination. I was not informed beforehand as to the specifics of this interrogation, apparently because the examiners were after the truth of the matter and probably felt that the element of surprise would tend more profitably to that end. Professors are rather like politicians: give them ample time to consider any question, they are apt to expatiate ad nauseam. I did know, because of your "formal complaint," what the fundamental charge might be: sexual harassment. But, as that might be anything from gang rape by a branch of Hell's Angels to an indiscreet plucking at one's own wedgie, I couldn't imagine what witches' spew might be brewing.

Consider, Virginia, the second article of impeachment first. Had you voiced your exception to blow-job in class, two things would have occurred. First, you would have been given credit for class participation, according to our academic contract; second, I would have reminded you of the orientation I announced on day one. To wit, however idiosyncratic it may seem, I take all of the English language as my medium or as an opportunity for scrutiny – I do not make "political" or "moral" or "social" distinctions between one word, one phrase, and another. (I will make note that others do, when such notation is instructive.) The only distinctions worthy of critical attention pertain to sense, or meaning, and thus to communication. (On rare occasions, where three or more students have expressed common discomfort, I have acceded to such a significant minority. The intent, after all, is to teach – not to posture or to proselytize.) I leave the subjective categories of "obscene" or "profane" or "vulgar" to Goody Twoshoes and to the bizarrely schizoid courts. The latter understand that flag-burning is legitimate symbolic expression, and that neo-Nazis and racial supremacists must be allowed to voice their hatred. Violence is as homespun as Oklahoma City and Waco; we know how, and have a will, to protect our own. Try making allusions to sexual or other body functions? Let's hear how you sound, buddy, with your tongue torn out.

Furthermore, I probably would have pointed out that "blow-job" is a euphemism, and an absurd one at that. There have been blow-jobs galore executed on campus nearly every day of this unseasonably mild autumn. Young men, with gasoline-fueled engines strapped to their backs, have repeatedly disrupted my daytime

classes via the cacophonous blow-jobs they administer to the reverberating quadrangle. (Those who maladministrate this college apparently deem a tidy milieu more critical than intramural discussion or lecture. Perhaps we should indict those responsible: for "environmental harassment," for perpetrating an aerial and auditory pollution far more egregious than any of my dynamic ejaculations. But there is little justice, Virginia, on this campus or in this world – only officious straining at gnats whilst camels hump through.)

Speaking of wordly injustice, I understand that my blow-jobs were peculiarly reprehensible, mayhap even criminal, because they were allusions to the spectacular entanglements of a William Jefferson Clinton and one Monica Lewinsky. What, the grand inquisitor wanted to know, could I possibly adduce to justify the discussion of political science in an English class? (I have subsequently been informed by students that at least two of our math professors also entertained this topic during class time. Mirabile dictu. Yet, I must concede, proliferation of crime does not absolve any isolated criminal.) It says, after all, in the cover letter to the college's "Revised sexual harassment policy" (July 30, 1997) that "Regular use of profane, vulgar, or obscene speech in the classroom which is not germane to course content (and thus educational purpose) as measured by professional standards will lead to the imposition of discipline."

But you see, Virginia, this sort of legalese is variantly known in the grown-up, adventitiously sane, world as bullshit. Profanity, vulgarity (I'm especially fond of this one, since it ensnares virtually everyone in its aristo-analcratic web; look it up, and you'll see what I mean. You

will think: "sump'n ain't right here," and you'll be right, and wrong, altogether.), and obscenity (this one's a doozy, too. "Inciting lustful feelings; lewd," is the second definition. The other applications are reminiscent of "vulgar." The only persons in my classes who are stirred, in any antisocial sense, by my diction are either the very unfortunately "wired," on the one hand, or the very young, Virginia, on the other.) – all these are in the eye of the beholder. That's why even so august a body as the U. S. Supreme Court has continually tied itself into comical knots trying to sort out the sordid, parse the putrid, and teet the totter. That which is "germane to course content" is best left to the professional (more on "academic freedom" later), while "imposition of discipline" is reserved for the amusement of inquisitors.

Nevertheless, I was somewhat taken aback by this "germanity," and possibly failed to make the fullest explanation. That is, while the preponderance of my classroom time focuses on the "analysis of the function of particular words, phrases, or images" that appear in our texts, I don't want my students mistakenly presuming that such analytical skill is germane only to literature. You may recall that we also examined statements offered in the "media" or in other printed sources. For example, apropos the President and the Intern, I probably commented on a CNN reporter's language early in September when she said: "The president was involved in another prickly face-off vis-á-vis the press this morning." I may well have pointed out that the cunning linguist who wrote this script failed to tripp up the straight-faced journalist who had to deliver so slyly veiled an allusion to fellatio. James Joyce, who flourished in an era almost

as neurotic as our own, and who was a consummate word-smith enamored of pun and innuendo, would have loved this broadcast moment.

By the bye, Virginia, you may be pleased to learn that fellatio is the preferred articulation of the grand inquisitor. He used this variant at least twice during cross-examination of my person. Fellatio, being Latin, is deader than Cleopatra's asp. When dragged into English dialogue, it constitutes a euphemism which does for communication what blurring does for lenses, what "snow" does for TV, what static does for radio. As such, it reminds one of William Faulkner's character Snopes, who'd step on the gas pedal and the brake pedal at the same time, generating considerable noise but scant motion. I can recall my own mother posing ambiguities when she yelled at me: "Don't touch that! That's ca-ca!!" I couldn't tell if she was referring to the dog turd on my right or the attractive, E-coli-free-but-used condom on my left. (Giving the latter a blow job, I was thrilled at how rapidly and easily it filled. . . . Years later, when she lay dying of colon cancer, I would irrigate her stoma betimes with my bare finger; it definitely was shit, but it wasn't ca-ca.) Wherever the grand inquisitor's pettifogging fellatio may have drifted or tended, he might have been talking about sucking cock anyway. Hard to say.

I am sorry, Virginia, that you find your own language, the English language, so painful.

What about the other charge, that I committed one buttfucking? I was invited to reconstruct the context for that one, that snappy trap, since it apparently didn't dovetail with the political "digression." I'm depressed to

admit I stumbled here, too; I was more fascinated by the collective inquisitors' scribbling in reaction to my affirmative, my admission; and, though I labored, I only vaguely remembered the circumstance. Now, however, I seem to recall that we – the class – were discussing the Greek word philia, and its multiple manifestations in modern English. I believe we covered "philosophy," love of wisdom; and "Philadelphia," love of the adelphoi, the brothers; and "pedophile," love ("love?!" – how absolutely absurd, we agreed) of children; and, finally, after several others, we wandered toward "necrophilia," love of death or, erotically, of the dead. Then, because I assume I am among adults who are students of life as well as of language, we talked about a notorious instance in Detroit some fifteen years ago wherein an Indian Village gardener murdered his girlfriend, buried her body on the estate grounds, then dug it up two weeks later and fucked the corpse – because he was certain "she" must have gotten lonely. To lighten things, after the gasps (no one regurgitated his or her supper on the floor, so I presumed some of the gaspers were emulating one of my traits: reveling in the histrionic), I used a Sam Kinison skit for comic relief. You know, the one where he imagines he's a corpse lying face down in a mortuary cooler, chilling out, congratulating himself for having fought the good fight, noting the looming presence of, what, the mortician? Why is he pulling Sam's fantoid's pants down?! What's he – Oh no!! NO!!

I miss Sam, the ex rev(erend). Life can be such a pain in the ass. It takes comic genius to conjure: is death also? I am sorry if you didn't appreciate my Samitation (don't look that up; it's a neologism, same as "fantoid" before it.

We're not supposed to indulge creative urges such as this unless we're famous. But, hell, I'm pushing sixty, and legitimate license is eluding my gasp.) You know, Virginia, my very caring, very percipient wife, speculates that this is what flipped you out, that perhaps someone important to you had died not long before. Is that true?

Literature and language, then, are my main concern, but analysis of same is not all I teach. Analysis is very important – but so is synthesis, the harmonizing of everything one is learning in formal situations such as the classroom with everything else that one has discovered – with everything that one is Becoming. As I often say (do you remember?), the characters that you meet in novels and stories and dramas and poems are not specimens on a Petri dish, remote, dissociated, unutterably alien. They are your kin; they are your reflection; they are you. The best artists are awesome gifts to us; Shakespeare, some say, is the finest psychologist who ever lived. Just so. And if you're not seeing your face in these mirrors, at least one of two things is true: you are not reading the literature very well, or, and this is far worse, you are not reading your own life very well. And there goes the Socratic challenge, his quintessential invitation: "to lead the unexamined life is not fit for a human being."

That Socratic test prods us to make every effort to raise to the fullness of consciousness all the forces and influences that have formed us, whether in the narrow confines of family or the broader world of friends and fellow citizens. Everything (including linguistic prejudices) we have learned, have found imprinted on our souls, is subject to review, regardless of source. Not the parent or the peer, not the preacher or the pedagogue,

who has altered us is above scrutiny. Test all things, and only then hold fast to what seems true.

We all start out as figments of others' imaginations, stuck with a cluster – usually contradictory – of derivative beliefs, values, opinions, biases, and "knee jerk" behavior. The more ancient a personal modifier, the more suspect it is: "I have believed thus-and-so all my life!" exposes not some noble constancy but, rather, the squawk of the parrot. Having, being, merely such a borrowed persona, the Self is always vulnerable: every alien idea, every weird or wild word, shakes such selves to the prefabricated core.

When we discuss, then, these masters' literary opera (that's a more charming plural – don't you agree? – than "opuses," which sounds like a disease, a suppurating sore; even dead Latin can sometimes afford us, the living, a chance to sing, a chance to play), you have observed that I often include personal anecdotes, illustrations from my own life of Walter Mittyesque incompetence, of "Open window"-like coups laid upon stuffy adults, of Little Chandler- or Bob Doran-like sexual fear and sexual fumbling. (For some reason you only cited my "sexual escapades;" weren't my nonsexual escapades interesting or memorable? I must try harder.) When I recount such anecdotes, I, as is true of most fine teachers, am offering a species of "modeling," practicing what I preach. See, student, this fictional jerk, buffoon, hypocrite, craven, etc., etc. – that was, hopefully no longer is, your teacher. I essay to make it safe for you to see your face, too. And many do. I can summon in fond memory those who've said: "This is more like a class in psychology!" or "a class in philosophy!" or "a class in history!" or "a class in

comparative religion!" or "a class in . . . science" is what I wish someone someday will say. No one has, and the silence is eloquent. Because I don't deserve better. But, you know – well, only a very few could guess – this is my darkest, deepest passion, to be a scientist. I expound on Shakespeare and Joyce, but I dream about Galileo and Einstein. Go figure (I never could, math being my vanquishing dragon). Consider the most intriguing "defnition" of humanity that I have ever heard: we are the process of the sun becoming conscious of itself. There, fellow Milky Wayf'er, is stuff enough to dream on for a googolplex of lifetimes.

I am so very sorry, Virginia, that you find my language, the English language, so painful.

I am also sorry that you grossly misrepresented an important aspect of our classroom experience: you allege that I "used [my] teacher position as a platform for authority to intimidate [my] students not to complain about [me]. Mr. Bonnell repeatedly made fun of students who had expressed offense or disgust and he also laughed at them. This is one of the reasons why I did not come forward sooner." This reminds me of what David Schippers said to the other witch-hunters in congress today (Dec. 10, 1998) about Clinton, that his lies were worse than mere lies "because they were half-truths." You make it <u>seem</u> that there were actual students that you witnessed actually being mocked or ridiculed by me. Paradoxically, this one of your allegations is the most obnoxious (to me, not to the majority of administrators, who babble rhetoric about "student needs" and yet give neither fig nor rat's derriere for real students' interests –

except for the few who come sidling over with fashionable complaints), because it is the one so alien to my nature, to my habits of respect and nurturance for the people I know I am privileged to meet.

It is true – this is your half of a truth – that I talked about previous hassles with the college administration over some students "lining up" (an obvious exaggeration for comic effect) at some dean's office to complain about the "bad man" with the "potty mouth." And, yes, a semester or more after the fact, I probably dismissed such folks (especially the cowards, the ones who never broach their disaffection in class or at any time to my face) with a gibe, a jeer, a hiss of derision. I tend to get a tad defensive when people don't just disagree with me, my values, my behavior, but who would also campaign for and delight in my utter destruction. Disagreement is fine; I welcome it and always remember to reward it. The clash of ideas and values is usually both exciting and illuminating. But I have never "dressed down," attacked, insulted, or ridiculed any actual student in any actual class. And you know that; you know there can be no corroboration for your arrant lie. (Shame on you, Virginia – so very young and yet so devious.)

Much is made, at least by the grand inquisitor and his ilk, about the power a teacher has, the power to grade, the power to humiliate. I cannot speak for my colleagues, but I know this to be a grave distortion where I am concerned. Those few students who poise a knife at my back are, indeed, afraid of something, but it isn't I. What they fear is the wrath of their peers, their classmates – other human beings put at risk, betrayed, by the craven treachery of one or, rarely, two. All their cowering

behind the inquisitor's hooded robe cannot conceal this truth. But, irony of ironies, because of the contract I made with you at the commencement of the term, and because you'd earned sufficient credit before demanding my head on a platter, I am morally obliged to record on your account a passing grade. It is as much my integrity, and none of your terrorist's tactics, which prospers you.

Again, have actual students ever gotten uncomfortable in my classes? Certainly. I am not a "post-modernist," a flaky "relativist" who thinks any idea is just as wonderful as any other. I definitely do not respect lots of folks' beliefs, values, ideas, notions, prejudices, customs – but, curiously enough, I do respect the people. As Pope John XXIII put it back in 1958: "error has no rights, but those who subscribe to the errors do." A horde of Catholics weren't happy, back then, with such a mealy-mouthed sentiment; they hankered for the consignment of all "them comm'nist bastards and hair-ticks" to eteral flames, at least. They would have gleefully done to their enemies, Virginia, what you would do to me now. The only defense people such as I have against people such as you is in your hands: my words.

My language, my words. While broadly distinguishing between what I call "the discourse of reason" and "the discourse of passion," I take all language as my world, since the gradations between the antipodes are often so subtle. (This very apologia, you will perhaps notice, has a bit of reason amid the rush of passion. (C'est moi.) Sometimes, in a classroom, I become so enthused (en theos, the god within: beware, beware; his flashing eyes, his dancing hair!), so animated, so caught up in an exigent flow, the stream of words pours forth like molten

gold that hopefully heats and informs as it dazzles – or, at other times, tumbles and cools like a high waterfall. (I'm also very modest.) If I had to check this flow, constantly monitor its force or direction, I would be, I would have to become, a radically different, a wholly diffident, teacher. Sure, I can be, and often am, the calm pedagogue, precisely measuring out the cadences appropriate to pure reason. But if I had to be that always, a very important part of me would die. (The only way the inquisitors of the world can ever ensure "germaneness," good Germaneness, is when all the classes are on-line. There'll be no messy spontaneity then, in their dreary Dystopia.)

It's to avoid such death, to withhold "the chilling effect" of self-censorship, that our culture has evolved the practice of "academic freedom." This is not some bonus, some perk designed to comfort teachers. And its bestowal does not depend upon the pleasure of administrators or colleagues. It exists, rather, for the benefit of students, your colleagues, your peers. They require authentic, truthful guides, mentors, sources – to question, to push against, to grow with. And one day, hopefully, to rise far above. This can't happen with robots, with company men, with even the very best of good Germans.

So, then to conclude this my apologia. I am sorry, almost ineffably sorry, that you find our language, the English language, so painful. You will never have the power, of course, to restrict it, or to kill part of it, as you wish. Nor am I possessed of the tongue of men and of angels, so as to protect it from you or all the tribe of its detractors. It will continue to wend its way and may even find complete vindication, one day, from its shaky jurisprudential custodians. I will probably not see that day, as

it lies somewhere beyond the frenetic millennial epoch. But you may. Hopefully, by then, you will have learned to appreciate it. Maybe, then, you will understand that life without the fullness of your language's energy would be like that life Khalil Gibran says languishes without love: life where you may still laugh, but not all of your laughter; where you may still cry, but not all of your tears.

Oh! – the sanity clause! Virginia, I almost forgot! Here it is: "Congress shall make no law . . . abridging the freedom of speech. . . . " This has driven the thought police, the language censors, and all deputy inquisitors beyond despair, into madness. If I had access to your Christmas stocking, I would stuff it there. When, at length, you grow up, you will cherish it above every other gift, save love itself. Cheers.

APPENDIX C

[LOGO] Macomb
Community
College

Office of the Provost

MEMORANDUM

TO: Mr. John Bonnell

FROM: /s/ RBB Dr. Rose Bellanca, Provost

SUBJECT: Disciplinary Suspension

DATE: July 9, 1999

This memorandum is submitted as a statement of my findings regarding the charges of insubordination, breach of confidentiality, retaliation, and disruption of the educational process alleged in the notice of charges dated June 7, 1999.

Disruption of Educational Process

You contributed materially to the disruption of the educational process in class sections 271 KC (26 out of 28 students did not attend), 122 LA (25 out 27 students did not attend), and 122 LC (all 28 students were absent) on February 1 and 2, 1999, by three or more of the following means in each section: a) informing your students of the impending suspension on these dates; b) telling them, in effect, it was their choice whether they should attend class during your suspension; c) referring to Vice President William MacQueen's directive to you of January 8,

1999, as a "gag order"; d) reminding students of your policy of awarding credit for not attending class to students who sign an "attendance sheet" when you are absent; and e) distributing a copy of Susannah Derouin's complaint to Roger Weber of *Channel 4 News* and *The Macomb Daily*.

Each of these means was improper, and collectively they formed a personal encouragement to your students to disrupt the educational process in support of your cause and in protest of your 3-day suspension. Their impropriety is evident. You were directed on January 8, 1999, not to discuss your suspension with your students, yet you admittedly informed your students in all three of these sections that you were to be suspended on February 1-3. (See statements of Jeanette Estridge and Kelly Pierce, students in 271 KC; statement of Wayne Hukill, a student in 122 LA; statement of Sherry Davis, a student in 122 LC; and your statement on May 25, page 6.) Rather than encourage them to attend class in your absence – or at least remain silent on the question – you told the students in at least two of the three sections (271 KC and 122 LC) it was their choice whether they should attend class (see statements of Patrick Akerley (a student in 271 KC), Kelly Pierce, Denise Walsh (a student in 271 KC), and Sherry Davis; and your statement on May 25, 1999, page 25). In tandem, these statements are tantamount to saying to your students "I am to be suspended, and because I am to be suspended you don't have to attend class." They constitute a clear violation of the January 8 directive not to discuss your discipline with your students.

In at least two of the three sections (122 LA and 122 LC), you reminded the students of your policy of granting

credit because of your absence, thereby promising them a reward for their own non-attendance. (See statements of Wayne Hukill, Nicole Richard [a student in 122 LA], and Sherry Davis; your statement on May 25, 1999, pages 23-25; and the "attendance sheet . . . signed in full and total SUPPORT of Mr. Bonnell and in full and total PROTEST of Mr. Bonnell's suspension"). This reminder was not an innocent, coincidental restatement of pre-existing policy. To the contrary, your first-day handout for English 122 states "Attendance . . . will be taken but no credit can be earned for attendance, except on days when I am absent *and such absence was not announced in advance* (emphasis supplied). Students in attendance at such times should sign a sheet of paper, and the last one to sign should deposit the list in my mail-slot in F-211." By its terms, your policy does not apply to an absence announced *in advance*, as was the case here. Moreover, what was the point of *reminding* students of your policy other than to induce them not to attend class? Finally, awarding credit for a student's non-attendance when a substitute teacher is provided makes no sense. Your reminder had only one apparent purpose, and that was to encourage students to boycott classes in your absence.

Two other actions contributed to the disruption of the educational process in your classes: informing your students that you could not discuss your impending suspension because of the College's "gag order" (see statement of Denise Romanowski, a student in 271 KC; this statement is itself a violation of Mr. MacQueen's directive of January 8) and your distribution of Ms. Derouin's complaint to Channel 4 and *The Macomb Daily*, which violated Mr. MacQueen's directive as well as College policy, the

collective bargaining agreement with MCCFO, and Federal and State law.

Viewed together, your actions amount to an impermissible effort to enlist the sympathy and material support of your students in your cause against your employer and led to the disruption of the educational process in your classes and other classes on campus on February 1 and 2. I must remind you that the College is morally and legally obligated to provide an orderly and safe learning environment, one that promotes student learning and is free from the threat of violence. As you know, an altercation did erupt during the February 1, 1999 student demonstration on your behalf.

As a result of your disruption of the educational process, you are hereby formally reprimanded and warned that any future actions which contribute to the disruption of the educational processes at the College will subject you to further discipline.

Insubordination

During the week of January 17 and/or 24, 1999, you committed multiple acts of insubordination by discussing your impending discipline on February 1-3, 1999 with your students in clear violation of Mr. MacQueen's January 8, 1999 directive to you. On January 15, 1999, or thereabouts, and January 26, 1999, or thereabouts, you committed multiple acts of insubordination in violation of that same directive by distributing a copy of Susannah Derouin's complaint to Roger Weber of *Channel 4 News* and to *The Macomb Daily*.

Mr. MacQueen's directive of January 8 stated: "Because your posting, distribution and discussion of student complaints of sex harassment or your use of obscene or vulgar language conveys the message that complaining students may expect to be ridiculed by you and ostracized by their classmates, and thus may be deterred from complaining, you are hereby directed not to post, distribute, or discuss verbally or in writing (inside or outside the classroom) specific complaints filed by one or more of your students against you regarding sex harassment or your use of obscene or vulgar language, or such complaints against you generally, with any person enrolled in one or more of your classes unless written permission has been granted for good cause by Dr. Rose Bellanca upon application of your union or attorney. This prohibition extends to discussion of any disciplinary action which has been or may be taken against you."

Federal and State law impose a legal duty on the College to provide a learning environment free from sex harassment and a breach of this duty exposes the College to liability. College policy prohibits a teacher's use of obscene, profane or vulgar language in the classroom which is not germane to course content as measured by professional standards, and is specifically written to protect the rights of individuals who may choose to complain. Because individuals who feel aggrieved have the right to be heard, the College cannot and will not tolerate an employee's efforts to discourage complaints and ridicule complainants.

The directive of January 8, 1999 was issued to you in the wake of your previous efforts to stifle such complaints

and to publicly malign and intimidate individuals who file a complaint. Consider the following:

- You posted on the departmental bulletin board (to which students have access) the January 19, 1998 letter of a student's father complaining about your classroom use of such words as 'fuck', 'cunt', and 'pussy.'
- You posted Susannah Derouin's November 6, 1998 complaint of sex harassment on the same bulletin board.
- Two of the numerous student letters submitted on your behalf in November, 1998, quote directly from Ms. Derouin's complaint.
- You justified your use of obscene and vulgar language in Susannah Derouin's class by telling the class "This is how I teach," and derisively related how you have dismissed prior complaints from students. According to Ms. Derouin, you "laughed out loud and giggled like a little kid" in relating your handling of complaints from two former students (a woman and a male member of the clergy), attempting to make it clear to the class that complaining is futile.
- When Ms. Derouin asked for an apology you responded by writing your eight page document titled *An Apology: Yes, Virginia, There is a Sanity Clause* and distributing it to all of the College's full-time faculty, Roger Weber of *Channel 4 News*, *The Macomb Daily*, and at least one male student whose name is unknown to the College. Attached to your document was a copy of Ms. Derouin's complaint requesting an apology.

My point in reciting these events is simply to demonstrate that the college had a compelling reason for issuing the January 8 directive to you. By posting or distributing student complaints, as well as discussing them in class,

you have attempted to make it perfectly clear to your students what they may expect if they complain about you. Your repeated attempts to thwart the complaint process can not be ignored by the College.

As a result, the College finds you were insubordinate under the January 8 directive, and in light of the previous three-day disciplinary suspension which was issued to you, you are hereby suspended from your duties without pay for a period of fourteen calendar days, commencing August 18, 1999, and ending August 31, 1999. Your fringe benefits will remain in place during the period of this suspension.

Breach of Confidentiality and Retaliation

On December 21 and 22, 1998, or thereabouts, you violated a) Section I. A. and Section II of the College's Policy Prohibiting Sexual Harassment, b) Article VIII.A.7. of the Master Agreement between Macomb Community college and the Macomb Community College Faculty Organization, c) the Family Educational and Privacy Rights Act, d) Title IX of the Educational Amendments to the Civil Rights Act of 1964, and e) the Elliott-Larsen Civil Rights Act by distributing a copy of Susannah Derouin's complaint and your memorandum titled *An Applogy: Yes Virginia, There is a Sanity Clause* to all full-time faculty members and a male student whose name is unknown to the College.

On January 15, 1999, or thereabouts, and January 26, 1999, or thereabouts, you violated a) Section I.A. and Section II of the College's Policy Prohibiting Sexual Harassment, b) Article VIII.A.7. of the Master Agreement

between Macomb Community College and the Macomb Community College Faculty Organization, c) the Family Educational and Privacy Rights Act, d) Title IX of the Educational Amendments to the Civil Rights Act of 1964, and e) the Elliott-Larsen Civil Rights Act by distributing a copy of Susannah Derouin's complaint and your memorandum titled *An Apology: Yes, Virginia, There is a Sanity Clause* to Roger Weber of *Channel 4 News* and to *The Macomb Daily*.

Unlike the charges of disruption of the educational process or insubordination under the January 8 directive, which are offenses against a broad class of students or the institution itself, breach of confidentiality and retaliation strike specifically at an individual, and therefore are considered to be far more serious offenses. It must be recognized at the outset that Ms. Derouin regarded her complaint of November 6, 1998 as a complaint of sex harassment. Not only did she say as much in the complaint itself, but she verbally related some of your sexually-laden classroom commentary to the administration during the investigation of her complaint. For example:

- After a student mentioned "urban legends," you informed the class that you were trying to create urban legends yourself. You told the class that once you tried masturbating by smearing Vaseline on the inside of a toilet paper roll, inserting the roll over your penis, and then placing the toilet paper on or in a washing machine; however, your "cock" (to use your word) lost interest.

- You related to the class that as a young man you experienced guilt as the result of your masturbation, sought absolution from your priest, and threw away your *Playboy* magazines; however, after some time

passed your resolve evaporated, and you resorted to the story of Lot in the Bible for masturbatory stimulus.

- You related to the class your dream about a naked red-haired girl in your bed, saying it was one of the best dreams you have ever had.
- You related to the class your first sexual experience with a woman, saying you couldn't get your "soldier to stand at attention."
- You related to the class that you and your first wife would fondle each other and then go to church for absolution.

Of course, this commentary was in addition to the obscene and vulgar language for which you were disciplined in February ('shit', 'damn', 'fuck', 'ass', 'butt-fucking', 'blow job', 'tits on a nun are useful as balls on a priest'). Clearly, Ms. Derouin's complaint may be regarded as a colorable complaint of sex harassment even though you were not charged. Consequently, Ms. Derouin was entitled to the full protection of the law and College policy providing for confidentiality and prohibiting retaliation. Section III. D. of the College's Policy Prohibiting Sex Harassment (which was distributed to all faculty) clearly states that "Macomb Community College shall assure that no individual shall be retaliated against for making a complaint of sexual harassment, opposing sexual harassment, or participating in an investigation under this policy, *regardless of whether a policy violation is found* (emphasis added).

Further, the law, College policy, and Article VIII.A.7. of the collective bargaining agreement with MCCFO cannot be satisfied simply by redacting the complainant's name from the complaint. "Confidentail" means secret and the

requirement of confidentiality extends beyond the identity of the complainant to the complaint itself. This guarantee of confidentiality was utterly and repeatedly ignored by you.

By drawing the attention of the full-time faculty, other students, and the public at large to her complaint, you caused Ms. Derouin to suffer anguish, which may be regarded as a form of retaliation. The distribution of your memorandum titled *An Apology: Yes, Virginia, There is a Sanity Clause* was designed to discredit her as an immature young woman in need of enlightenment, and thus was designed to destroy her credibility as a complainant. Most significantly, your memorandum is thoroughly insulting and demeaning to Ms. Derouin as a person in both its content and its tone. It is the very antithesis of how a teacher should treat a student and how a complainant would expect to be treated given the assurances of the law and College policy.

As a teacher at Macomb Community College, you do not enjoy a privileged status placing you outside the norms of the college community or society in general. Without a high degree of mutual respect and trust between teachers and learners, Macomb Community College cannot succeed as an academic institution nor protect the academic environment. If an administrator or other staff member at Macomb treated a teacher as contemptuously as you treated Ms. Derouin, there would be a hue and cry from the faculty for termination of the offender's employment. If you truly desire to continue teaching at Macomb, you must bring yourself to recognize and respect the limits of your position and your responsibilities as a member of the teaching profession and our learning community.

The College finds your actions to be serious and willful violations of institutional policy, written directives from people in positions of proper authority, and most importantly, to be serious and willful violations of the legal and personal rights of a student who followed proper procedures in filing a complaint against you. It is also clear that you were fully aware of the severity of your actions since you were quoted repeatedly in the media, saying that you would probably be fired for what you had done. But, despite your own recognition of the severity of your actions and the formal written warning from the administration to discontinue them, you persisted with the offending behavior.

The College, therefore, finds you breached confidentiality and retaliated against the complaining student. In determining the appropriate discipline to be imposed for these offenses, the College has looked to the "guidance" published by the Office of Civil Rights within the U.S. Department of Education and to case law. The OCR Guidance states that the school should tell the complainant that Title IX prohibits retaliation and that, if she or he is afraid of reprisals from the alleged harasser, the school will take steps to try to prevent retaliation *and will take strong responsive actions if retaliation occurs.* The College tried to prevent further retaliation by its directive to you of January 8, 1999, which you ignored. The College now feels obliged to take strong responsive action. Case law supports actions as severe as termination as being appropriate discipline for breach of confidentiality.

The College gave serious consideration to terminating your employment effective immediately. However, in deference to your length of service with the institution, and

in the belief that rehabilitation is still possible, the College has decided upon a suspension instead. Therefore, you are hereby suspended from your duties without pay for the four months of the Fall 1999 semester, commencing August 18, 1999 and ending December 18, 1999. This suspension will run concurrent with the fourteen day suspension issued for insubordination. In anticipation of your return to work in the Spring semester, your fringe benefits will remain in effect during the period of the suspension.

c: Albert Lorenzo, William MacQueen, Gus Demas, Ruth Reed, Marie Baeckeroot, personnel file